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In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 61

GERTRUDE KAY, ALIAS GERTRUDE KLEIN, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

No opinion was rendered by the trial court. The opinion of the Circuit Court of Appeals (R. 595–599) is reported in 89 F. (2d) 19.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 12, 1937. The petition for writ of certiorari was filed May 14, 1937, and was granted June 1, 1937 (R. 601). The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. See also Rule XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the Circuit Court of Appeals was correct in holding that it was foreclosed from considering the alleged errors arising upon the bill of exceptions because the bill was not timely settled.

2. Whether the conviction should be affirmed either (a) because it may be sustained under Section 35 of the Criminal Code, or (b) because a plea of guilty was withdrawn too late.[1]

3. Whether Section 8 (e) of the Home Owners' Loan Act as originally enacted on June 13, 1933, and as subsequently amended is constitutional, and whether Section 8 (a) of that Act is constitutional.

4. Whether petitioner can challenge the general provisions of the Home Owners' Loan Act.

5. Whether the Home Owners' Loan Corporation is constitutional.

STATUTES AND RULES INVOLVED[2]

The Home Owners' Loan Act of June 13, 1933, c. 64, 48 Stat. 134 (U. S. C., Title 12, Section 1467 (a) and (e)) provides in part:

> SEC. 8. (a) Whoever makes any statement, knowing it to be false, or whoever willfully overvalues any security, for the purpose of influencing in any way the action of the

[1] These questions are not raised in the petition but are advanced in support of the judgment below.

[2] The relevant portions of the Home Owners' Loan Act of 1933, as amended to date, are printed in the Appendix, pages 104–120, *infra*.

Home Owners' Loan Corporation or the Board or an association upon any application, advance, discount, purchase, or repurchase agreement, or loan, under this Act, or any extension thereof by renewal deferment, or action or otherwise, or the acceptance, release, or substitution of security therefor, shall be punished by a fine of not more than $5,000, or by imprisonment for not more than two years, or both.

* * * * *

(e) No person, partnership, association, or corporation shall make any charge in connection with a loan by the Corporation or an exchange of bonds or cash advance under this Act except ordinary charges authorized and required by the Corporation for services actually rendered for examination and perfecting of title, appraisal, and like necessary services. Any person, partnership, association, or corporation violating the provisions of this subsection shall, upon conviction thereof, be fined not more than $10,000, or imprisoned not more than five years, or both.

Section 8 (e) of the Home Owners' Loan Act, as amended by Act of April 27, 1934, c. 168, Sec. 12, 48 Stat. 643, 647, reads:

No person, partnership, association, or corporation shall, directly or indirectly, solicit, contract for, charge or receive, or attempt to solicit, contract for, charge or receive any fee, charge, or other consideration

from any person applying to the Corporation for a loan, whether bond or cash except ordinary fees authorized and required by the Corporation for services actually rendered for examination and perfection of title, appraisal, and like necessary services. Any person, partnership, association, or corporation violating the provisions of this subsection shall, upon conviction thereof, be fined not more than $10,000, or imprisoned not more than five years or both.

Section 35 of the Criminal Code, as amended by the Act of June 18, 1934, c. 587, 48 Stat. 996 (U. S. C., Title 18, Sec. 80), provides in part as follows (matters eliminated by the Act of June 18, 1934, are contained in brackets; additions are indicated by italics):

Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever [, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, or for the purpose and with the intent of cheating

and swindling or defrauding the Government of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder,] shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, *in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder* shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

Rule II, Par. (4), of the Criminal Appeals Rules provides:

> A motion to withdraw a plea of guilty shall be made within ten (10) days after entry of such plea and before sentence is imposed.

Rule IV of the Criminal Appeals Rules provides:

> *Control by Appellate Court.*—The clerk of the trial court shall immediately forward the duplicate notice of appeal to the clerk of the appellate court, together with a statement from the docket entries in the case substantially as provided in the form hereto annexed.

From the time of the filing with its clerk of the duplicate notice of appeal, the appellate court shall, subject to these rules, have supervision and control of the proceedings on the appeal, including the proceedings relating to the preparation of the record on appeal.

The appellate court may at any time, upon five (5) days' notice, entertain a motion to dismiss the appeal, or for directions to the trial court, or to vacate or modify any order made by the trial court or by any judge in relation to the prosecution of the appeal, including any order for the granting of bail.

Rule IX of the Criminal Appeals Rules provides:

Bill of Exceptions.—In cases other than those described in Rule VIII, the appellant, within thirty (30) days after the taking of the appeal, or within such further time as within said period of thirty days may be fixed by the trial judge, shall procure to be settled, and shall file with the clerk of the court in which the case was tried, a bill of exceptions setting forth the proceedings upon which the appellant wishes to rely in addition to those shown by the clerk's record as described in Rule VIII. Within the same time, the appellant shall file with the clerk of the trial court an assignment of the errors of which appellant complains. The bill of exceptions shall be settled by the trial judge as promptly as possible, and he shall give no extension of time that is not required in the interest of justice.

Bills of exceptions shall conform to the provisions of Rule 8 of the Rules of the Supreme Court of the United States.

Upon the filing of the bill of exceptions and assignment of errors, the clerk of the trial court shall forthwith transmit them, together with such matters of record as are pertinent to the appeal, with his certificate, to the clerk of the appellate court, and the papers so forwarded shall constitute the record on appeal.

The appellate court may at any time, on five (5) days' notice, entertain a motion by either party for the correction, amplification, or reduction of the record filed with the appellate court and may issue such directions to the trial court, or trial judge, in relation thereto, as may be appropriate.

STATEMENT

The petitioner was convicted in the District Court of the United States for the Eastern District of New York under eight counts of an indictment charging separate violations of the Home Owners' Loan Act (R. 6).

Counts 5 and 15 charged that petitioner as second mortgagee had liens on the properties of one Terrone and one Wilson who were applicants for loans from the Home Owners' Loan Corporation. The counts charged that she willfully and feloniously made false statements on September 4, 1934, and June 4, 1934, to the Home Owners' Loan Corporation regarding the amounts due her from these ap-

plicants, to wit, $590, instead of $285, and $650 and one year of accrued interest instead of $150, and offered to the Home Owners' Loan Corporation to release her claims in the property of the applicants in exchange for Home Owners' Loan Corporation bonds in the specified false amounts. The parenthetical citation at the end of each count indicated that it was based on Section 8 (a) of the Home Owners' Loan Act. (R. 13–16; 31–34.)

Counts 12 and 25 charged that the petitioner on June 5 and between July 21 and September 5, 1934, unlawfully and feloniously received from property owners Benemerito and Sciortine, respectively, the sums of $50 and $100 in payment of proposed and purported aid in connection with projected loans from the Home Owners' Loan Corporation. The counts further charged that these payments were not for ordinary charges or fees as authorized by the Home Owners' Loan Corporation for necessary services actually rendered. The parenthetical citation at the end of each count indicated that it was based on Section 8 (e) of the Home Owners' Loan Act. (R. 27–28; 49–50.)

Counts 8, 14, 20, and 24 charged that petitioner on July 29, April 1, in July, and on July 20, 1934, unlawfully and feloniously entered into a contract with property owners Beyer, Wilson, Iovino, and Sciortine, respectively, to receive the sums of $250, $40, $100, $300, in payment for petitioner's proposed and purported aid in connection with pro-

jected loans from the Home Owners' Loan Corporation. The counts further charged that these payments were not for ordinary charges or fees as authorized by the Home Owners' Loan Corporation for necessary services actually rendered. The parenthetical citation at the end of each count indicated that it was based on Section 8 (e) of the Home Owners' Loan Act. (R. 21–22; 30–31; 42–43; 48–49.)

Petitioner's motion to set aside the verdict was denied (R. 496). She received a sentence of a year and a day in prison on each of Counts 5, 12, 14, 15, 20, 24, and 25, the sentences to run concurrently. On Count 8, upon which imposition of sentence was suspended, she was placed on probation for two years (R. 6).

The indictment was returned on February 5, 1935 (R. 3). Petitioner pleaded not guilty to all counts on February 21, 1935 (R. 3). She did not immediately go to trial. Continuances were apparently granted (R. 3–4). On January 2, 1936, she pleaded guilty to Counts 7 and 12, withdrawing her former plea of not guilty (R. 4). However, on January 15, 1936, after an interval of eleven days, excluding Sundays and holidays, petitioner withdrew her plea of guilty on these counts (R. 4). The case was tried between May 13 and 19, 1936 (R. 5). Petitioner was sentenced on May 29, 1936 (R. 6).[3]

[3] While the petitioner's notice of appeal (R. 535–538), dated May 26, 1936, stated that the date of the judgment was

On June 1, 1936, the petitioner filed her notice of appeal and assignment of errors (R. 6.).[4] On June 30, 1936, the trial judge extended the time for the filing of the bill of exceptions and assignment of errors to August 18, 1936 (R. 6).[5] This was the only order of extension entered by the trial judge within thirty days after the taking of the appeal. The bill of exceptions was not settled and filed until October 1936 (R. 532).[6]

Subsequent to the expiration of thirty days from the taking of the appeal four orders of extension

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May 26, 1936, the docket entry appearing in the record (R. 6), which is verified by a certified copy thereof furnished by the United States Attorney for the Eastern District of New York, discloses that the sentence was rendered on May 29, 1936. At that time the judgment setting forth the sentence did not have to be signed by the judge who imposed the sentence, as is now required by the amendment of May 24, 1937, to Rule I of the Criminal Appeals Rules. Consequently, no written judgment appears in the record.

[4] While the petitioner's notice of appeal was dated May 26, 1936 (R. 535–538), the docket entry appearing in the record discloses that the notice was filed on June 1, 1936 (R. 6).

[5] This order does not appear in the record and the docket entry in the record merely shows that the order was entered on June 30, 1936 (R. 6). A certified copy of the order, furnished by the United States Attorney for the Eastern District of New York, discloses that the petitioner's time to file the bill of exceptions and assignment of errors was extended to August 18, 1936.

[6] The order settling the bill of exceptions leaves the date in October when it was settled blank. A stipulation and orders of extension appearing in the record indicate that the bill was settled between October 13 and 19, 1936 (R. 532–534; see also R. 596).

were entered, either by the trial judge or another judge of the district in his absence, extending the time for filing the bill of exceptions, on August 18, 1936 (R. 6), September 8, 1936 (R. 6), September 25, 1936 (R. 6, 33), and October 13, 1936 (R. 533, 534). Some if not all of these orders also purported to extend the time for filing the assignment of errors, and apparently were entered pursuant to consent of counsel for the Government (R. 533–534). Under the last order of extension the petitioner was allowed until October 19, 1936, to file her bill of exceptions and assignment of errors. An amended assignment of errors appears in the record (R. 539–591), but the date of its filing is not disclosed.

The Circuit Court of Appeals for the Second Circuit unanimously held (R. 595–599) that it could not consider the errors assigned by the petitioner which arose upon the bill of exceptions because the bill was not settled within the time permitted by the Criminal Appeals Rules. It therefore limited its consideration of the appeal to the sufficiency of the indictment and the judgment of the trial court. It upheld the constitutionality of the Home Owners' Loan Act as well as the particular penal provisions upon which the counts of the indictment under which the petitioner was convicted were based. Accordingly, it affirmed the judgment of the District Court (R. 599–600).

SUMMARY OF ARGUMENT

I

The court below correctly refused to consider the assigned errors based upon the bill of exceptions, for this bill of exceptions was not settled and filed within the time permitted by the Criminal Appeals Rules. Only one order was entered by the trial judge within thirty days after the appeal was taken. He thereafter had no authority to make further extensions. *Ray* v. *United States,* 301 U. S. 158. The Circuit Court of Appeals did not grant, and was not asked to grant, any further extension.

II

Counts 5 and 15 charge that petitioner made false statements to the Home Owners' Loan Corporation, as to the amount of indebtedness due him by a mortgagor, for the purpose of influencing its action. This charge states an offense under Section 35 of the Criminal Code. The parenthetical citation, indicating that Section 8 (a) of the Home Owners' Loan Act was relied on, may be disregarded. The conviction may thus be affirmed without consideration of any part of the Home Owners' Loan Act.

In addition, the Court should note that petitioner withdrew a plea of guilty on Count 12 after expiration of the time allowed by the Criminal Appeals Rules. If these time limits are jurisdic-

tional, the judgment as to that count is one rendered by consent so that the entire judgment must be affirmed.

III

Sections 8 (a) and 8 (e) of the Home Owners' Loan Act are constitutional. Section 8 (e) must be considered both before and after its amendment on April 27, 1934.

Before its amendment, Section 8 (e) forbade any person from making "any charge in connection with a loan * * * except ordinary charges authorized and required by the Corporation for services actually rendered." The power of Congress to protect borrowers from improvident contracts and extortion seems beyond question. Similarly there can be equally little question as to the power to authorize the Corporation to promulgate regulations under Section 8 (e). *United States* v. *Grimaud,* 220 U. S. 506, 521. Regulations forbade all except "ordinary and necessary charges." Since these provisions are directed to real estate agents and brokers, there should be little difficulty in their being able to determine what course is lawful.

Similar considerations apply to Section 8 (e) after its amendment. The failure of the amended statute to specify that the service must be in connection with a loan by the corporation does not invalidate it. No reasonable construction would lead to the application of the statute to any other type of transaction.

Section 8 (a) forbidding false statements in order to influence the action of the Corporation seems well within the Congressional power. Petitioner's objection that it might penalize a trivial offense is inapplicable to the facts of this case. The fact that she knowingly made the false statements indicates that they were material. It seems evident that overstating the amount of loan indebtedness for which bonds would be exchanged, was expected to be an important factor in the Corporation's decision as to what amount of bonds to offer petitioner.

Since the sentences are concurrent, the conviction must be affirmed, if any one of the Sections 8 (e) or (a) are constitutional.

IV

This case does not present the broad issues as to the constitutionality of the Home Owners' Loan Corporation which petitioner seeks to raise.

A. The penal provisions in Sections 8 (a) and 8 (e) are separable from the general provisions of the Act. Congress had power to prevent a fraud upon the public fund and those who sought to borrow from the Corporation, whether or not the Corporation should ultimately be held constitutional. Since these penal provisions may be enforced independently of the remainder of the Act, and since Congress must have intended to protect the Corporation and its borrowers,

whether or not its substantive operations were constitutional, the penal provisions must be taken to be separable. Accordingly, the general provisions are not in issue.

B. Apart from the separability of the penal provisions, petitioner has no standing to challenge the general provisions of the Act. These provisions do not affect and have not injured petitioner. It results that she is in no position to attack them as invalid. *New York ex rel. Hatch* v. *Reardon,* 204 U. S. 152, 161; *Virginian Railway Co.* v. *Federation,* 300 U. S. 515, 558.

C. Finally, and independent of these considerations, is the fact that petitioner is estopped to challenge the validity of the general provisions because under them she has sought benefits: the exchange of mortgage notes for the Corporation bonds, guaranteed by the United States. *Wall* v. *Parrot Silver & Copper Co.,* 244 U. S. 407, 411–412; *United Gas Co.* v. *Railroad Commission,* 278 U. S. 300, 307–308.

V

But if this Court should consider the constitutionality of the Home Owner's Loan Act as a whole, it is evident that the Corporation serves to carry out valid Federal purposes.

A. Twenty-four percent of the total non-governmental debt of the United States in 1934 was represented by urban home mortgages. This debt of about $17,700,000,000 represents a borrowing by

about 58 percent of the urban home owners, and the mortgaged homes house about 23,000,000 persons. It is apparent that both financial institutions and the homes of about one-fifth of the population required the maintenance of tolerably healthy conditions in the mortgage investment field. Yet in 1932 there had been almost 250,000 foreclosures of urban homes; by June of 1933 foreclosures were occurring at a rate of almost 70,000 a month. Available data indicate that about 44 percent of the first mortgages on owner-occupied urban homes were in default, and about 54 percent of the second mortgages.

During its three years of lending life, the Home Owners' Loan Corporation granted relief in the amount of over $3,000,000,000 to over a million needy mortgagors. The mortgagors in return gave 15 year amortized mortgage notes, bearing interest at the rate of 5 per cent. The Corporation now holds about one sixth of the urban mortgage debt of the nation, and has contributed to the marked decline in the number of foreclosures and to the improved condition of financial institutions which hold mortgage investments.

B. The Home Owners' Loan Corporation, just as the other Government created financial corporations which have preceded it, is an important fiscal agency of the United States and seems well within the reach of the broad fiscal powers of Congress. See *Norman* v. *Baltimore & Ohio R. Co.*, 294 U. S.

240, 303; *First National Bank* v. *Union Trust Co.*, 244 U. S. 416, 419.

The undisputed constitutionality of the Federal Home Loan Bank System (see *Smith* v. *Kansas City Title Co.*, 255 U. S. 180) seems necessarily to cover the Home Owners' Loan Corporation as well. The privilege of rediscount on sound mortgage collateral, offered by the Home Loan Bank System, cannot provide a permanent salvation for hard-pressed financial institutions in a time of a continuing urban mortgage crisis. The Corporation was designed to provide direct relief to mortgagors in order to insure the efficacy of the aid offered to the institutional mortgagees by the Home Loan Bank System. Moreover, the Corporation was authorized to purchase the bonds of the Home Loan Banks, and, under the rationale of *Smith* v. *Kansas City Title Co.*, is a fiscal agency of the United States for that reason alone.

Petitioner's failure to challenge the constitutionality of the Act after the amendments authorizing this purchase means that the judgments must be affirmed, for the concurrent sentences include one count based upon offenses committed after the date of the first of these amendments.

Even apart from its intimate relationship to the Federal Home Loan Bank System, the corporation is an important fiscal agency of the United States. It obviously served to protect the $800,000,000 urban mortgage investment of national banks and member banks of the Federal Reserve System.

Perhaps of equal importance, its effect in protecting the investments, and so the solvency, of other financial institutions served to protect the national banking system; the crisis of 1933 is too recent to permit any argument that national banks are only indirectly and remotely affected by the condition of other financial institutions.

C. The Corporation may, alternatively, be sustained because its operations provide for the general welfare.

It is unquestioned that Congress has a wide discretion in its decision as to what constitutes the general welfare. Its conclusion that the Corporation is directed toward this end seems plainly correct whether its functions be viewed as providing credit to an important class of the population or as preserving the home ownership of the nation's citizens. The close analogy to the Farm Credit System, the constitutionality of which has been settled beyond doubt, seems conclusive as to whether or not the extension of credit to a large class of the population constitutes a provision for the general welfare. See *Federal Land Bank* v. *Gaines,* 290 U. S. 247, 254. It is equally clear that the protection of their home ownership for over a million citizens, distributed through every State of the union, is a matter of basic public interest. *Home Building & Loan Assn.* v. *Blaisdell,* 290 U. S. 398. And, as fully as the relief of poverty in old age, *Helvering* v. *Davis,* No. 910, October Term, 1936,

does the preservation of home ownership relate to a problem of national concern. Petitioner apparently does not disagree with these conclusions, but argues merely that the accomplishments of the Corporation have been limited in extent. It seems to us to be obvious both that this cannot be the test of constitutionality and that the national benefits realized through the operations of the Corporation have in fact been of the first magnitude.

Even if it were possible for powers delegated to the National Government to be an invasion of the rights of the States or of the people under the Tenth or Ninth Amendment, the decision in *Helvering* v. *Davis, supra*, is conclusive that no such invasion arises through the operations of the Corporation.

ARGUMENT

I

THE CIRCUIT COURT OF APPEALS CORRECTLY REFUSED TO CONSIDER THE ERRORS ASSIGNED BY THE PETITIONER WHICH AROSE UPON THE BILL OF EXCEPTIONS, SINCE THAT BILL WAS NOT SETTLED AND FILED WITHIN THE TIME PERMITTED BY THE CRIMINAL APPEALS RULES

We submit that the Circuit Court of Appeals rightly held that, since the bill of exceptions was not settled and filed within the time permitted by the Criminal Appeals Rules, it was foreclosed from considering the errors assigned by the petitioner which arose upon the bill of exceptions.

The only order of extension entered by the trial judge within thirty days after the taking of the appeal, as permitted by Rule IX of the Criminal Appeals Rules (*supra,* p. 6), was that of June 30, 1936, which extended the time for the settlement and filing of the bill of exceptions to August 18, 1936. That the trial judge's authority to extend the time for the settlement and filing of a bill of exceptions expires, under Rule IX, on the 30th day after the taking of the appeal is beyond dispute (*Ray* v. *United States,* 301 U. S. 158, 162, and cases cited), and appears to be conceded by the petitioner (Br. 10). It is also beyond question that the Circuit Court of Appeals, upon motion and after five days' notice thereof, has the power under Rule IV, paragraph 3 (*supra,* p. 6) to shorten or lengthen the time of a valid extension granted by the trial judge by modifying or vacating his order or by giving directions to the trial court or trial judge. *Ray* v. *United States,* pp. 162–164.

No extension of time for the settlement and filing of the bill of exceptions was granted by the Circuit Court of Appeals in the instant case and, so far as the record discloses, no such extension was requested of that court.[7] Since the bill was

[7] The petitioner states (Br. 11) that "It [the court below] did not say that the appellant had offered inadequate excuses, nor that her *oral motion on the argument* of the appeal, repeated in her reply brief, was not timely." [Italics ours.] While the petitioner seems to indicate by this state-

not settled and ordered filed until October 1936, several months after the expiration of the only valid order of extension granted by the trial judge, and since no extension was requested of or granted by the Circuit Court of Appeals, that court was clearly right in holding that it was without power to consider the errors assigned by the petitioner which arose upon the bill of exceptions.

This decision, of course, is far different from a holding that an appellate court may not on a proper application under Rule IV, paragraph 3, extend the time for settling and filing the bill of excep-

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ment that she made an oral motion on argument of the appeal in the Circuit Court of Appeals for an extension of time, which was repeated in her reply brief in that court, there is nothing in the opinion of the Circuit Court of Appeals or elsewhere in the record which indicates that any such motion was made. A telegram from the United States Attorney for the Eastern District of New York, dated November 13, 1937, states that the Assistant United States Attorney who argued the appeal for the Government "does not recall any formal motion made orally to the court but does recall that appellant argued bill of exceptions was duly filed and was before the court for review on same grounds urged in appellant's reply brief." Examination of the reply brief to which the petitioner refers does not disclose any such motion. In short, that brief was based merely upon the propositions that the trial judge should be permitted under certain circumstances to grant extensions, although the thirty-day period prescribed by Rule IX had elapsed and that the Circuit Court of Appeals, because of the circumstances referred to in such brief, should consider the bill of exceptions in the instant case even though it was not settled and filed within the period of the only valid order of extension granted by the trial judge. Similar considerations were presented in the petition for writ of certiorari filed in this Court.

tions. There was no occasion for the Circuit Court of Appeals to consider in the instant case whether it had such power, because no such power was invoked by the petitioner. What the petitioner is in effect urging is that the Circuit Court of Appeals should have considered the bill of exceptions notwithstanding that it was settled and filed at a time when no valid orders of extension, either by the District Court or the Circuit Court of Appeals, were in effect. The Circuit Court of Appeals, of course, had no such power since it is well settled that the time limits prescribed by the Criminal Appeals Rules for the settlement and filing of bills of exceptions are jurisdictional and that, consequently, a bill filed out of time may not be considered.[8]

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[8] *Gallagher* v. *United States*, 82 F. (2d) 721, 722 (C. C. A. 8th); *Wolpa* v. *United States*, 84 F. (2d) 829, 831 (C. C. A. 8th); *Slade* v. *United States*, 85 F (2d) 786, 787 (C. C. A. 10th); *Wainer* v. *United States*, 87 F. (2d) 77, 80 (C. C. A. 7th), certiorari denied, 300 U. S. 669; *Goddard* v. *United States*, 86 F. (2d) 884, 885 (C. C. A. 10th); *Evans* v. *United States*, 90 F. (2d) 851, 852 (C. C. A. 5th); *United States* v. *Adamowicz*, 82 F. (2d) 288 (C. C. A. 2d), certiorari denied, 298 U. S. 664; *Cusamano* v. *United States*, 85 F. (2d) 132, 133 (C. C. A. 8th); *Spero* v. *United States*, 85 F. (2d) 134 (C. C. A. 8th), certiorari denied, 299 U. S. 601; *Cary* v. *United States*, 86 F. (2d) 461, 462 (C. C. A. 9th), certiorari denied, 300 U. S. 659; *St. Charles* v. *United States*, 86 F. (2d) 463, 464 (C. C. A. 9th), certiorari denied, 299 U. S. 611; *Pinkussohn* v. *United States*, 88 F. (2d) 70, 71 (C. C. A. 7th); *Miller* v. *United States*, 88 F. (2d) 102 (C. C. A. 9th); *Hightower* v. *United States*, 88 F. (2d) 302 (C. C. A. 9th); *Young* v. *United States*, 88 F. (2d) 305 (C. C. A. 10th).

As reasons why the Circuit Court of Appeals should have considered the bill of exceptions, the petitioner points to difficulties encountered in obtaining the stenographic minutes of the trial, the short time remaining after the minutes were obtained within which to prepare and settle the bill of exceptions, and delays in printing (Br. 6–7). But these are considerations which the petitioner should have addressed to the Circuit Court of Appeals by a proper motion under Rule IV, paragraph 3, for modification of the order of the trial judge by lengthening the extension granted by that judge for the settlement and filing of the bill of exceptions. *Ray* v. *United States,* p. 164.

Since the authority of the trial judge to settle a bill of exceptions, in the absence of an extension by the appellate court, is limited to the period prescribed by Rule IX, the mere fact that the United States Attorney consented to orders which would have permitted an untimely settlement of the bill of exceptions is, of course, of no avail to the petitioner. As was pointed out in *Wainer* v. *United States,* 87 F. (2d) 77 (C. C. A. 7th), certiorari denied, 300 U. S. 669 (p. 80):

> Appellants argue, however, that by stipulation of the parties or by estoppel the filing of the bill of exceptions beyond the time allowed may satisfy the requirements. Such a contention does violence to logic, for, *if the requirements of the rules are jurisdictional, neither the consent of the parties nor*

> *any act of the United States Attorney or of the Government is effective. Consent of the parties cannot give jurisdiction to courts. Pittsburgh, C. & St. L. Railway* v. *Ramsey,* 22 Wall. 322, 22 L. Ed. 823; *Chapin* v. *Irwin* (D. C.), 281 F. 831; *U. S.* v. *Adamowicz,* 82 F. (2d) 288 (C. C. A. 2). [Italics ours.]

See also *Exporters* v. *Butterworth-Judson Co.,* 258 U. S. 365, 369; *Slade* v. *United States,* 85 F. (2d) 786, 787 (C. C. A. 10th).

We assume that this Court, if it concludes that the Circuit Court of Appeals should have considered the bill of exceptions, will remand the case to that court for consideration of the alleged errors arising upon the bill of exceptions. Accordingly, we deem it unnecessary here to discuss such alleged errors.

II

The Judgments of Conviction Should Be Affirmed Irrespective of the Constitutionality of Any Part of the Home Owners' Loan Act

As the petitioner was given concurrent sentences of a year and a day on each of seven of the eight counts upon which she was convicted and sentenced[9] (Counts 5, 12, 14, 15, 20, 24, and 25;

[9] The eighth count is not involved in this appeal since the court suspended the imposition of sentence and placed the defendant on probation (R. 6). This count was, of course, not appealable since no sentence was rendered. *United States* v. *Lecato,* 29 F. (2d) 694 (C. C. A. 2d); *United States* v. *Messina,* 36 F. (2d) 699 (C. C. A. 2d);

see R. 6), it follows that if any one of these counts may be sustained the judgment of conviction must be affirmed. *Claassen* v. *United States,* 142 U. S. 140, 146–147; *Abrams* v. *United States,* 250 U. S. 616, 619; *Sinclair* v. *United States,* 279 U. S. 263, 299. We submit that Counts 5 and 15 may be sustained under Section 35 of the Criminal Code, and that the judgment on Count 12 was consented to by the petitioner and must be affirmed on review by an appellate court.[10]

United States v. *Levinson*, 54 F. (2d) 363 (C. C. A. 2d); *United States* v. *Knickerbocker Fur Coat Co.*, 66 F. (2d) 368 (C. C. A. 2d); *Starklof* v. *United States*, 20 F. (2d) 32 (C. C. A. 9th).

[10] These questions were not considered by the courts below and were not raised by the petitioner. They may, however, be presented for the consideration of the Court as arguments in support of the judgments below. *Stelos Co.* v. *Hosiery Corp.*, 295 U. S. 237, 239; *Langnes* v. *Green*, 282 U. S. 531, 537–538; *United States* v. *American Ry. Express Co.*, 265 U. S. 425, 435–436; see *Farmer's Guide Co.* v. *Prairie Co.*, 293 U. S. 268, 281; Compare, however, *Zellerbach* v. *Helvering*, 293 U. S. 172, 182; *Lynch* v. *United States*, 292 U. S. 571, 587–588; *Burnet* v. *Commonwealth Improvement Co.*, 287 U. S. 415, 418. In these cases the Court has refused to pass on respondents' contentions because they had not yet been considered by the lower courts. This reasoning would appear to be inapplicable here. If the penal provisions upon which Counts 5 and 15 purported to be based were held unconstitutional by this Court, there would be no new trial as to those charges in the trial court and the question as to whether the charges make out offenses under Section 35 could not again be urged in this proceeding. That the Government under the Act of May 10, 1934, c. 278, 48 Stat. 772 (U. S. C., Title 18, Secs. 587, 588), perhaps may be permitted to present the charges to another grand jury, with a

1. Count 15 (R. 31–34), which alleged that the offense was committed on or about June 4, 1934, charged that the petitioner:

> for the purpose of influencing the action of the Home Owners' Loan Corporation, a corporation organized and existing under and by virtue of an Act of Congress * * * upon an application for a loan * * * filed with the said Home Owners' Loan Corporation by said Nellie R. Wilson, said loan being for the purpose, among others, of refunding an indebtedness to said defendant, Gertrude Kay * * * secured by a mortgage held and owned by the said defendant on said premises, did then and there, in a certain instrument known as Form No. 2 Revised, dated June 4, 1934, and filed with said Home Owners' Loan Corporation, unlawfully, knowingly, willfully and feloniously make to the said Home Owners' Loan Corporation a certain false statement in writing * * *.

There then follows a "Mortgagee's Consent to Take Bonds," addressed to the Home Owners'

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view to obtaining a new indictment based on Section 35, does not, it seems to us, change the situation. Obviously, the grand jury could refuse to indict for reasons having no relevancy to the question whether the charges stated offenses under Section 35 and the consideration of that question would forever be foreclosed. As to Count 12, if the appeal may be considered as one from a consent judgment, an affirmance would necessarily result on the theory that there are no questions presented for review by the appellate court (see *supra*, pp. 34–36).

Loan Corporation and dated June 4, 1934, in which the defendant made the statement that she was a holder of a second mortgage or other obligation, which constituted a lien or claim on the title to the home property of Nellie R. Wilson in the sum of $650 and one year's interest, including unpaid balance of principal and interest to date. The count then proceeded to allege that:

> as the defendant, Gertrude Kay * * * well knew, there was not due to the defendant on * * * the 4th day of June, 1934, on the mortgage held by the said defendant * * * on the premises aforesaid * * * the sum of Six Hundred and Fifty ($650.00) Dollars, but that in truth and in fact there was due to the said defendant * * * the sum of One Hundred and Fifty ($150.00) Dollars, as the said defendant then and there well knew * * * such statement * * * to be false; against the peace and dignity of the United States and contrary to the form of the statute in such case made and provided (Title 12, United States Code, Section 1467 (a)).

If this count charged an offense punishable by any law of the United States, it appears to be settled that a conviction thereon must be sustained even though the pleader may have had in mind when he drew the count some other statute under which the count for some reason could not be upheld. Allegations not essential to a charge under the statute upon which the count can be sustained

will be treated as surplusage. *Hammer* v. *United States,* 271 U. S. 620, 625; *United States* v. *Nixon,* 235 U. S. 231, 235; *United States* v. *George,* 228 U. S. 14; *Williams* v. *United States,* 168 U. S. 382, 389; *Vedin* v. *United States,* 257 Fed. 550 (C. C. A. 9th), certiorari denied, 250 U. S. 663; *Maresca* v. *United States,* 277 Fed. 727, 741–742 (C. C. A. 2d), certiorari denied, 257 U. S. 657; *Farley* v. *United States,* 269 Fed. 721, 724 (C. C. A. 9th). To illustrate, in the *Farley* case, the defendant was indicted under Section 3242, Revised Statutes, for unlawfully carrying on the business of a retail liquor dealer without having paid the special tax as required by law. The court held that Section 3242 had been impliedly repealed by the National Prohibition Act but that the indictment sufficiently charged a sale of liquor in violation of the National Prohibition Act and it was therefore sustained. The allegation with respect to the omission to pay the special tax was treated as surplusage.

The mere fact that the pleader at the end of the count in question indicated by the use of the parenthetical citation that the statute which he had in mind when he drew the count was Section 8 (a) of the Home Owners' Loan Act does not prevent the utilization of some other statutory provision to sustain the count if it cannot be upheld under the section indicated. Thus, in the *Maresca* case, *supra,* it was said (p. 71):

In the Nixon Case the entries on the back and in the caption of the indictment described it as being for violation of a certain statute, which was inapplicable, and the court declared that this did not invalidate the indictment, but that it was for the court to say whether there was any statute in existence which made the facts charged a a crime; "an indictment must set out facts and not the law," and the indorsements constituted no part of the indictment. In the absence of an allegation in the count that the unlawful act charged constituted a violation of a specific statute, the mere indorsement in parentheses at the end of the count is in the opinion of the majority of the court of no greater significance than the same words would have if they had been indorsed on the margin of the indictment or on the back of the indictment or in the caption of the indictment. In all these cases the indorsement indicates the intention of the pleader to rest the indictment upon the statute named, but that intention cannot nullify the indictment or in any wise conclude the government if there is some other statute which can sustain it. For many years it has been the practice in the Southern district in drawing indictments to do what was done in drawing this count, but the practice is an unfortunate one, as it is quite unnecessary to allege the particular statute which has been violated.

The parenthetical reference at the end of the count to the statutory provision which the pleader had in mind in drawing the count may, we believe, be rejected as surplusage. The count was not, we submit, defective in omitting reference to the statute on which it could be predicated. As was said by this Court in *Hammer* v. *United States, supra* (p. 625), "The indictment does not specify the section under which it is drawn, but the omission is immaterial."

In the light of the principles referred to we contend that this count may be sustained under Section 35 of the Criminal Code and that therefore the constitutionality of the penal provisions of the Home Owners' Loan Act which the pleader had in mind in drafting the count is immaterial.

At the time of the offense charged in Count 15, Section 35 so far as material provided that—

> whoever * * * for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, shall knowingly and willfully * * * make or cause to be made any false or fraudulent statements or representations * * * shall be fined not more than $10,000 or imprisoned not more than ten years, or both."

That Count 15 meets all of the material elements of this section would seem apparent. Reduced to

its essentials, it alleged that the defendant falsely stated the amount of indebtedness due her on her second mortgage in an application filed with the Home Owners' Loan Corporation, a corporation organized under and by virtue of an Act of Congress, for the purpose of influencing the action of that corporation upon an application for a loan. It cannot be disputed, of course, that the Home Owners' Loan Corporation is a corporation in which the United States is a stockholder (see *United States* v. *Walter,* 263 U. S. 15). The purpose of the misstatement was to induce the corporation to turn over its bonds to the petitioner in exchange for evidence of an indebtedness greater than that which was actually owing to her. Default by the mortgagor was made more likely, and the recovery on foreclosure of the advances to him was made more doubtful because of the inflated value of the loan. Accordingly, the count sufficiently charged that the misstatement was made with the intent of "cheating and swindling or defrauding" a corporation of which the United States was a stockholder. It was not necessary, of course, that the Government should sustain an actual pecuniary loss because of the petitioner's misstatement; it was sufficient merely if such misstatement was made for the purpose and with the intent of causing pecuniary loss. Cf. *United States* v. *Cohn,* 270 U. S. 339. The mere fact that the petitioner's false statement was not made under oath does not remove the offense charged from the purview of

Section 35. *United States* v. *Dumas*, 288 Fed. 247 (E. D. N. Y.).

2. We moreover submit that the fifth count of the indictment can similarly be sustained under Section 35 of the Criminal Code, as amended June 18, 1934, c. 587, 48 Stat. 996, without regard to the constitutionality of the Home Owners' Loan Act as a whole or the penal provisions which the pleader had in mind in drafting that count.

Count five (R. 13–16), which was based upon another misstatement by the petitioner as to the amount due her on a second mortgage in connection with an application to the Home Owners' Loan Corporation for a loan, is similar in all essential respects to Count 15, except that the offense was laid on or about September 4, 1934.

Section 35 of the Criminal Code, as amended on June 18, 1934, provides, so far as material,[11] that:

> whoever shall * * * make or cause to be made any false or fraudulent statements or representations * * * in any matter within the jurisdiction * * * of any corporation in which the United States of America is a stockholder shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

It will be observed that the section as amended does not require that the false representation must be

[11] We have set out Section 35, *supra*, pp. 4–5, to show the relevant provisions before and after its amendment on June 18, 1934.

made "with the intent of cheating and swindling or defrauding" a corporation of which the United States is a stockholder. It would therefore seem apparent that after the amendment the false representation need not be made with any intent that it cause pecuniary loss to the Government; that it is sufficient merely that it be made "in any matter within the jurisdiction of any corporation in which the United States of America is a stockholder." It was apparently the presence of the words "cheating and swindling or defrauding" which led the Court in *United States* v. *Cohn,* 270 U. S. 339, 346–347, to hold that Section 35 related only to a pecuniary or property loss by the United States.[12]

As the misstatement charged in Count 5 was obviously made in connection with a matter "within the jurisdiction" of the Home Owners' Loan Corporation, there would seem to be no question but that the count states an offense under Section 35 as amended. But even if the section, despite

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[12] The legislative history of the amendment is meagre, but indicates that a pecuniary loss was no longer to be required under the section. The relevant part of the amendment was made in the Senate Committee, after passage of the original bill by the House. The Committee said (Sen. Rept. No. 1202, 73d Cong., 2d Sess.):

"The first two committee amendments were proposed by the Department of the Interior for the purpose of reaching a large number of cases involving the shipment of 'hot' oil, where false papers are presented in connection therewith,

the amendment, may still be considered as requiring an intent to cause pecuniary loss, we submit that, for the reasons stated in connection with Count 15, the conviction should be sustained on Count 5 under Section 35 of the Criminal Code, irrespective of the constitutionality of Section 8 (a) of the Home Owners' Loan Act.

3. It should also be pointed out that as to Count 12 the petitioner on January 2, 1936, entered a plea of guilty but was permitted by the trial judge on motion made on January 15, 1936, to withdraw that plea (R. 4). It is evident, therefore, that 11 days, excluding Sundays and legal holidays, intervened between petitioner's plea of guilty and her

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and also those cases within the Public Works Administration where contractors are performing work payable from the Public Works Administration appropriation, and false certificates are made as to the actual wages paid. * * *"

The explanation on the floor of the Senate (78 Cong. Rec. 11270) relates only to the false returns by contractors and to the protection of Government property which was the occasion for the original House bill.

It is evident that the false statements relating to the control of "hot oil" shipments could not result in a pecuniary loss to the United States (see N. I. R. A., Sec. 9 (c), c. 90, 48 Stat. 195; *Panama Refining Co.* v. *Ryan*, 293 U. S. 388), and must be the explanation for the elimination of the words "cheating and swindling or defrauding." However, it should be noted that on May 10, 1934, shortly before the Committee report on May 18, 1934, a tax on all petroleum production had been enacted (c. 277, secs. 604, 605, 48 Stat. 680, 766), in part to aid in the enforcement of the "hot oil" legislation.

motion to withdraw such plea.[13] Rule II, paragraph 4, of the Criminal Appeals Rules provides that "A motion to withdraw a plea of guilty shall be made within ten (10) days after entry of such plea and before sentence is imposed," and Rule XIII, so far as pertinent, provides that "For the purpose of computing time as specified in the foregoing rules, Sundays and legal holidays (whether under Federal law or under the law of the State where the case was brought) shall be excluded." In providing that the motion to withdraw a plea of guilty shall be made "within 10 days after the entry of such plea," it would seem that paragraph 4 of Rule II is mandatory in character. See *Escoe* v. *Zerbst,* 295 U. S. 490, 493; *Ex parte Jordan,* 94 U. S. 248, 251. This would seem also to be indicated by the view that "The time limits fixed by the Rules [Criminal Appeals Rules] are jurisdictional" and that the purpose of the Rules "is to force early termination of criminal cases." *Fewox*

[13] There were two Sundays in the period between January 2, 1936, and January 15, 1936, but no legal holidays. In the State of New York Saturday is not a half holiday in computing days elapsed in any court proceeding. McKinney's General Construction Law, Section 20; *Van Orden* v. *Simpson*, 90 Misc. 322, 324 (Appellate Term); *People* v. *Kearney*, 47 Hun. 129, rev'd on other grounds, 110 N. Y. 188. Eleven days therefore intervened between the plea of guilty and the motion to withdraw such plea.

v. *United States,* 77 F. (2d) 699, 700 (C. C. A. 5th).

If the withdrawal of the petitioner's plea of guilty may be disregarded because the motion therefor was not timely made, it would seem to follow that her appeal from the sentence on Count 12 was in effect an appeal from a judgment rendered by consent. While such an appeal under the practice obtaining in the Federal courts will not be dismissed, it is settled that the judgment must be affirmed without consideration of the merits of the appeal. *Nashville C. & St. L. R. R. Co.* v. *United States,* 113 U. S. 261; *United States* v. *Babbitt,* 104 U. S. 767; *Pacific R. R.* v. *Ketchum,* 101 U. S. 289; *Berman* v. *United States,* 88 F. (2d) 645, 646 (C. C. A. 2d), pending in this Court, No. 26, Oct. Term, 1937. If, for the reasons stated, petitioner's conviction on Count 12 should be affirmed without consideration of the merits it is apparent that no consideration need be given either to the constitutionality of the Home Owners' Loan Act as a whole or the section on which that count is purported to be based. This would, of course, also be true as to the remaining counts on which petitioner was convicted, since the sentences on those counts were directed to run concurrently with the sentences under Count 12 and involve the same punishment as was imposed on that count. (See *supra,* p. 25.)

III

Sections 8 (a) and 8 (e) of the Home Owners' Loan Act Are Constitutional

A. Section 8 (e), as enacted on June 13, 1933, is constitutional

Petitioner contends that Section 8 (e) of the Home Owners' Loan Act is unconstitutional as being too vague and indefinite. Her argument (Br. 25–28) seems confined to the section as it was amended on April 27, 1934. She apparently overlooks the fact that Count 14 was based upon the section as it was originally enacted on June 13, 1933. We submit that this section, as originally enacted, was constitutional and that Count 14 states an offense under that section.

Count 14 of the indictment (R. 30–34) alleges that the petitioner

> on or about the 1st day of April, 1934, * * * did then * * * unlawfully, knowingly, wilfully and feloniously contract with one Nellie R. Wilson for the payment to the said defendant [petitioner], Gertrude Kay, alias Gertrude Klein, by the said Nellie R. Wilson, of a charge of Forty ($40.00) Dollars; that the said Nellie R. Wilson, as the defendant well knew, was a person applying to the Home Owners' Loan Corporation * * * for a loan on certain property owned and occupied by the said Nellie R. Wilson as her home * * *

> * * * that the said contract for the said charge made as aforesaid, was in connection with the said loan to the said Nellie R. Wilson from the Home Owners' Loan Corporation, and was for alleged services rendered and to be rendered by the said defendant, Gertrude Kay, alias Gertrude Klein, to the said Nellie R. Wilson, in connection with the said loan; that the said contract for said charge made as aforesaid was not for an ordinary charge or fee authorized and required by the said Home Owners' Loan Corporation for services actually rendered for examination and perfection of title, appraisal, and like necessary services * * * *

Section 8 (e) of the Home Owners' Loan Act as enacted on June 13, 1933,[14] provides:

> No person * * * shall make any charge in connection with a loan by the Corporation or an exchange of bonds or cash advance under this Act except ordinary charges authorized and required by the Corporation for services actually rendered for examination and perfecting of title, appraisal, and like necessary services.

The action of the Board of Directors of the Home Owners' Loan Corporation referred to in the instant section was taken on January 23, 1934,

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[14] Section 8 (e) was not amended until April 27, 1934, or 26 days subsequent to the commission of the crime charged in Count 14.

by a Resolution which specifically provides that the "ordinary charges authorized and required" should include (1) an appraisal fee, as approved by the Board, (2) a fee for a character report, as approved by officials of the Corporation, (3) necessary recording fees, (4) necessary charges for perfecting title, over $75 only on approval of Board, (5) necessary and usual fees for title abstracts and opinions, as approved by counsel of the Corporation, (6) charges for escrow services and closing loans, as approved by counsel of the Corporation, (7) "any other necessary charge for like necessary services, as specifically approved by the Board of Directors." (A copy of the Resolution was available on request in all state offices; its full text is in the Appendix, *infra*, p. 123.)

1. There can be little question but that Congress had the power to limit and regulate the charges which could be made in connection with the granting of a Government loan. The Home Owners' Loan Corporation was designed to offer direct aid to the small home owner who was in default on his mortgage indebtedness. Section 8 (e) was designed to protect home owners "against improvident contracts, in the interest not only of themselves and their families but of the public" (*Yeiser* v. *Dysart et al.*, 267 U. S. 540, 541), and Congress could "by all suitable laws guard and protect the fund thus devoted from being diverted from its

object by either the craft or the extortion of unscrupulous agents" (*United States* v. *Hall*, 98 U. S. 343, 356).[15]

2. Similarly, we think that there can be equally little question as to the power of Congress to authorize the Home Owners' Loan Corporation to promulgate regulations pursuant to Section 8 (e) and to decree that a violation of these rules would be an offense punishable according to the terms of the statute. *United States* v. *Shreveport Grain & Elevator Co.*, 287 U. S. 77, 85; *United States* v. *Grimaud*, 220 U. S. 506, 521; *Field* v. *Clark*, 143 U. S. 649, 694.

Petitioner (Br. 26) objects because the Resolution was not set out in the indictment. The record does not disclose that the petitioner at any time prior to the judgment by the District Court attacked the validity of the indictment because of the absence of the resolution. No such question, we submit, may now be raised. In any event, this resolution need not be alleged, because judicial notice can be taken thereof.

3. The only remaining question is whether Section 8 (e) and the Resolution is sufficiently specific to define a crime.

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[15] See also *Hines* v. *Stein*, 298 U. S. 94, 98; *Margolin* v. *United States*, 269 U. S. 93; *Calhoun* v. *Massie*, 253 U. S. 170, 173–174; *Frisbie* v. *United States*, 157 U. S. 160, 166; *Purvis* v. *United States*, 61 F. (2d) 992, 998 (C. C. A. 8th).

It should be pointed out that petitioner made no motion for a bill of particulars and it is fair to presume that she was fully apprised of the crime with which she is charged. Nor did she direct any preliminary motions to the indictment, such as a demurrer or a motion to quash.

With regard to the facts of this case, the question is whether petitioner had notice that her charges were unlawful because they were not the "ordinary charges authorized and required by the Corporation" and which were permitted by the Resolution of January 23, 1934.

The Resolution (*infra,* p. 123) lists six categories of charges which may be made for specified services and a seventh general provision, requiring specific approval of the Board of Directors. These services were performed by persons approved by the officers of the Corporation, and payment to them was made by the applicant through the Corporation. We think it most unlikely that petitioner, or any other person not employed by or with the approval of the Corporation, could have thought that the charges she exacted from the applicants were those contemplated by the Resolution. Similarly, it seems impossible that any person performing the services specified in the Resolution, at the request or with the approval of the Corporation, could be convicted under Section 8

(e). There seems, accordingly, no room for any ambiguity whatever in Section 8 (e) as originally enacted and as interpreted by the Resolution adopted pursuant to its terms.

Indeed, by citing the cases of *United States* v. *Monaghan* (E. D. Mo.), decided January 8, 1935, and *United States* v. *Damon and Layton* (D. Minn.), decided October 10, 1935 (neither case has been officially reported), in support of her attack upon the constitutionality of Section 8 (e) as amended on April 27, 1934, petitioner may perhaps have indicated an agreement with the view of those decisions that the section as originally enacted was constitutional. In *United States* v. *Monaghan,* the defendants contended that Section 8 (e), as enacted on June 13, 1933, was unconstitutional because it did not specifically define an offense. The District Judge, in overruling the demurrer, said that the instant provisions were "sufficiently definite and certain," that the "regulations relating to charges that might be made for services rendered in connection with loans would supplement the above statute so as to sufficiently inform the public as to what acts would constitute an offense." In *United States* v. *Damon and Layton,* the defendants were charged with having violated Section 8 (e), as amended on April 27, 1934. At the conclusion of the Government's case, Judge Molyneaux dismissed the proceeding

because Section 8 (e) as amended was unconstitutional. He said, however:

> All that Congress has to do is to pass it over again and put these words [found in the original Section 8 (e)] in and then they will have a good statute.

In the case of *United States* v. *Willard*, 8 F. Supp. 356 (W. D. Mich.), cited by petitioner (Br. 27), the defendant was charged with a violation of Section 8 (e), as enacted on June 13, 1933, at a time prior to the issuance of the regulations of January 23, 1934 (*supra*, p. 39). The holding that the statute was too vague prior to the promulgation of the Regulations has no application to the instant case.

For the reasons stated, we submit that Section 8 (e) of the Home Owners' Loan Act, as enacted on June 13, 1933, is valid and constitutional, and that the judgment of the District Court as to Count 14 should be affirmed. Petitioner does not argue that Count 14 does not charge an offense within the statute. It follows, since the sentences were concurrent, that this Court need not review the other counts of the indictment upon which petitioner was found guilty (see *supra*, p. 25).

B. SECTION 8 (E), AS AMENDED ON APRIL 27, 1934, IS CONSTITUTIONAL

Counts 12, 20, 24, and 25 of the indictment charge a violation of the provisions of Section 8

(e), as amended on April 27, 1934. Petitioner argues (Br. 25–28) that these provisions are so vague and indefinite as to be unconstitutional. Section 8 (e) as amended on April 27, 1934 (*supra*, pp. 3–4) provides:

> No person, partnership, association, or corporation shall, directly or indirectly, solicit, contract for, charge or receive, or attempt to solicit, contract for, charge or receive any fee, charge, or other consideration from any person applying to the Corporation for a loan, whether bond or cash except ordinary fees authorized and required by the Corporation for services actually rendered for examination and perfection of title, appraisal, and like necessary services.

As in the case of Section 8 (e) prior to its amendment, the only possible source of ambiguity is what is to be considered an "ordinary fee" for "like necessary services." The petitioner's argument that the section is ambiguous as to whether it applies to persons other than employees of the Corporation seems without merit. "No person, partnership, association, or corporation" could not be construed to be limited to employees of the Corporation.[16] Our discussion of the effect of the Resolution under Section 8 (e) prior to its amend-

[16] *Romano* v. *Maglino*, 154 Misc. (Mun. Ct. N. Y.) 818, reaches the contrary result and seems clearly erroneous.

ment is equally applicable to the section after the amendment. So, too, is our discussion of the power of Congress to forbid the charge in question, and to give to the Corporation the power to prescribe regulations (*supra,* pp. 39–40) equally applicable.

The Circuit Court of Appeals for the Third Circuit, in the case of *Handler* v. *Hill,* 90 F. (2d) 573, (certiorari denied because filed too late, No. 416, October Term, 1937), held that Section 8 (e), as amended April 24, 1934, was constitutional and that it defined the offense with sufficient particularity.

The case of *United States* v. *Monaghan, supra,* cited by petitioner at page 27 of her brief in support of her contention that Section 8 (e), as amended April 27, 1934, is unconstitutional, is not directly in point. As indicated above (*supra,* p. 42), Section 8 (e), as enacted on June 13, 1933, was the statute involved in that case and was there declared constitutional. While the court indicated that the omission in the amended Section 8 (e) of the words "in connection with a loan by the Corporation or an exchange of bonds or cash advance under this Act" made the statute indefinite, it was either dictum or a mere reference to the decisions of other courts. *United States* v. *Damon and Layton, supra,* held the amended statute unconstitutionally vague on this ground. This

result seems based upon a very strained construction of the statute. None could reasonably suppose that Section 8 (e) was designed to forbid the interdicted fees and charges when made in transactions unconnected with the loans or exchanges of the Corporation. Only by injecting this rather far-fetched doubt does the statute become indefinite as to the persons to whom it applies.

It results that Section 8 (e), after as well as before its amendment on April 27, 1934, is constitutional. Petitioner does not argue that Counts 12, 20, 24, and 25 do not charge offenses within the statute. It results that the conviction should be affirmed; since the sentences are concurrent, it is unnecessary to consider the constitutionality of Section 8 (a), under which petitioner was convicted on Counts 5 and 15. (See *supra*, p. 25.)

C. SECTION 8 (A) IS CONSTITUTIONAL

Counts 5 and 15 (R. 13–16; 31–34) in substance charge that the petitioner in executing mortgagees' consents to take bonds of the Home Owners' Loan Corporation in full settlement of her liens on the applicants' property and for the purpose of influencing the action of the Corporation upon loans, falsely stated that her claims were respectively in the sums of $590 and $650, with accrued interest for one year, whereas in fact her claims were respectively only in the sums of $285 and $150, and that petitioner knew that the amounts which she

stated were false. The indictment followed the words of Section 8 (a) of the Home Owners' Loan Act (*supra*, pp. 2–3).

It seems clear that Congress has full power to punish persons who make false statements for the purpose of influencing the action of the Corporation. Petitioner apparently does not deny this, nor does she assert that Section 8 (a) violates the requirements of due process because it is unduly vague. She seems, instead, to object because (1) it might penalize a trivial offense, and (2) the amount of the loan was not influenced by the misstatement (Br. 28–35). Neither objection is valid.

1. Petitioner (Br. 29) seeks to invoke in her behalf the maxim of *de minimis non curat lex*. But this doctrine has no application. This Court in *Frisbie* v. *United States*, 157 U. S. 160, at page 167, said:

> The question of the guilt of the defendant does not depend on the amount of the excess. The rule *de minimis non curat lex* has no such application in criminal cases. The stealing of one cent is larceny as truly as the stealing of a thousand dollars. The amount may vary the degree, but it does not change the character of the crime.

Whatever might be the result if the statute were applied in cases where the offense was "a trivial slip of tongue," or to a critic of the Corporation policies (Br. 28, 32), it is evident that no such case is presented here. Those cases may be dealt

with if they should ever arise. Here, petitioner, in connection with an application by her mortgagor for a loan, overvalued her second mortgage claims by 105 and 333 per cent, respectively.

We know of no reason why Congress may not punish false statements, whether or not made under oath. Since the statute requires knowledge that the statements are false, no dangers to persons accused under Section 8 (a) are to be anticipated because there is not a further qualification that the misstatements be material. Since petitioner *willfully* made false statements, she herself has made the decision as to their materiality. At any rate, petitioner adduces neither principle nor authority to support these contentions.

2. The argument that petitioner's misstatements would not influence the action of the Corporation similarly ignores the fact that petitioner was convicted of knowingly misstating the indebtedness due her (see R. 16, 34). Persons ordinarily do not make conscious misstatements with the expectation that there will be no consequences.

We see no necessity to follow petitioner's analysis of the safeguards of appraisal and title-searching which surrounded the Corporation loan, or to oppose to hers our estimate of the "nuisance value" of second mortgages (Br. 29–31). It is sufficient that the amount of the second mortgage would obviously be a factor, and probably an important factor, in the decision as to what amount

of Corporation bonds would be offered in exchange.

Section 8 (a) was sustained in *United States* v. *Willard, supra,* and in *United States* v. *Kreidler,* 11 F. Supp. 402 (S. D. Iowa). A similar provision in the Federal Farm Loan Act was upheld in *McLanahan* v. *United States,* 12 F. (2d) 263 (C. C. A. 7th).

It seems clear to us that Section 8 (a) is open to no constitutional objection. Petitioner makes no argument that Counts 5 and 15 do not charge an offense under this section. It results that the judgment of conviction should be affirmed; since the sentences were concurrent, this conclusion would make it unnecessary to consider the validity of Section 8 (e), either before or after its amendment on April 27, 1934. (See *supra,* p. 25.)

IV

There Is No Occasion to Consider the Remainder of the Act

We have shown that Sections 8 (a) and 8 (e) of the Home Owners' Loan Act, containing the penal provisions under which petitioner was convicted, are not unconstitutional in themselves. Petitioner, however, attacks as unconstitutional not only the penal provisions but the substantive provisions as well. The Government submits that the record in this case does not put in issue the constitutionality of the Home Owners' Loan Corporation. This results because (a) the penal provisions are sepa-

rable from the rest of the statute, because (b) petitioner has no standing to raise the constitutionality of provisions which do not affect her, or because (c) she is estopped to challenge the Act which provides the benefits she sought to obtain. These questions will be discussed in the indicated order.

A. THE PENAL PROVISIONS ARE SEPARABLE FROM THE REMAINDER OF THE ACT

Petitioner does not present an argument to the effect that the general provisions of the Home Owners' Loan Act creating the Corporation and prescribing its functions, are inseparable from the penal provisions (cf. Br. 25). Her discussion of the constitutionality of the Act as a whole is, however, necessarily based on the assumption that the general provisions are inseparably linked to the penal provisions, which alone are directly in issue in this case. The Government submits that this tacit premise is unfounded, and that the penal provisions are valid and operative irrespective of the constitutionality of the Home Owners' Loan Corporation as such.

The purpose of Sections 8 (a) and 8 (e), as shown on their face and by their legislative history,[17] is to protect the public funds from fraud

[17] The hearings and reports show the anxiety of Congress to reach every type of fraud which might be worked on the Corporation funds and upon those who dealt with it. See House Hearings on Guaranty of Home Owners' Loan Corporation Bonds (H. R. 8403), 73d Cong., 2d Sess., p. 56; H. Rep. No. 1075, 73d Cong., 2d Sess., p. 7; 78 Cong. Rec. 6129.

and to prevent exploitation of needy applicants who seek to borrow these funds.

Congress has power to protect the public Treasury against fraud, even though the offense may relate to an appropriation subsequently held unconstitutional. *Madden* v. *United States,* 80 F. (2d) 672 (C. C. A. 1st), certiorari denied, 297 U. S. 710; *Langer* v. *United States,* 76 F. (2d) 817 (C. C. A. 8th); *United States* v. *Harding,* 81 F. (2d) 563 (App. D. C.); *United States* v. *MacDonald,* 10 F. Supp. 948 (W. D. Mo.); *United States* v. *Schor,* 13 F. Supp. 399 (E. D. N. Y.); *United States* v. *M. C. Seelig and Mesch Construction & Equipment Corp.,* decided December 8, 1936 (S. D. N. Y.); *United States* v. *Soeder,* 10 F. Supp. 944 (W. D. Mo.).[18] Under the rule of these cases there could be no question as to the constitutionality of an independent statute punishing frauds upon any agency of the United States, and upon those who deal with it, whether or not the agency be constitutional. The question is thus reduced to whether Sections 8 (a) and 8 (e) can similarly be held to be valid irrespective of the constitutionality of the other provisions of the Act. The answer to this question turns upon the separability of this section from the remainder of the Act.

Whether Sections 8 (a) and 8 (e) are separable from the remainder of the statute depends upon

[18] The above cases have been discussed in the brief for the United States in *United States* v. *Kapp,* October Term, 1937, No. 97, pp. 13–20.

whether they "can be given legal effect" standing alone (*Lynch* v. *United States,* 292 U. S. 571, 586; *Dorchy* v. *Kansas,* 264 U. S. 286, 290), and upon the intention of Congress (*Carter* v. *Carter Coal Company,* 298 U. S. 238). The separability clause in the statute (Section 9, *infra*) raises a strong presumption in favor of separability. *Utah Power Co.* v. *Pfost,* 286 U. S. 165, 184–185; *Carter* v. *Carter Coal Company, supra,* 312–313.

1. The penalty provisions in Sections 8 (a) and 8 (e) of the Home Owners' Loan Act are entirely independent of the remainder of the Act, and can clearly be given legal effect by themselves. Persons can be punished for attempting to defraud the Corporation, or to exploit applicants, irrespective of whether its loans should ultimately be held to have been made without constitutional authority. The plain purpose of Sections 8 (a) and 8 (e) was not to enforce the substantive provisions of the statute, but to protect Government funds and borrowers while the law was being administered.

2. The remaining question is one of legislative intention.[19] It is undoubtedly true that Congress would not have enacted Sections 8 (a) and 8 (e), punishing frauds upon the Corporation and those

[19] The dissenting opinion of Chief Justice Hughes in *Carter* v. *Carter Coal Company,* 298 U. S. at 322, indicates that where there is a separability clause, and "where the provisions are inseparable by virtue of inherent character," the Court need not proceed further in attempting to imagine what Congress intended.

who dealt with it, if it had not passed the remainder of the statute, creating the Corporation. It is equally plain, on the other hand, that Congress intended Sections 8 (a) and 8 (e) to stand, once the Act became operative, regardless of the constitutionality of the other sections of the Act. Congress was obviously aware both that large sums would be immediately expended under the statute and that there could be no decision determining its constitutionality until long after it had become effective.

In none of the familiar cases on separability has this Court been called upon to differentiate between the willingness of Congress to enact a portion of a statute separately in the first instance and its intention as to whether the law should be severed once it had gone into effect. See Stern, *Separability and Separability Clauses,* 51 Harv. Law Rev. 76, 98. Accordingly, the general language of decisions such as the *Carter* case, suggesting (p. 313) that the appropriate test is what Congress would have done had it been proposed at the outset that a part only of the statute be enacted, must "be taken in connection with the case in which these expressions are used." *Cohens* v. *Virginia,* 6 Wheat. 264, 399; *Humphrey's Executor* v. *United States,* 295 U. S. 602, 627.

We do not believe there can be serious doubt as to the action of Congress had it felt called upon to vote on a proposal that frauds against the Corporation and those who dealt with it should be

punished even though the Corporation ultimately be held unconstitutional. Since this is so plainly the result which would have been desired by Congress, it must be taken to have intended that Sections 8 (a) and 8 (e) should stand whether or not the rest of the Act was held invalid. Such an intention seems to us to be the only one which reasonably can be attributed to Congress.

It follows that Sections 8 (a) and 8 (e) are separable from the rest of the Act. It results that petitioner's conviction should be affirmed without consideration of the broad constitutional questions she seeks to put in issue.

B. PETITIONER HAS NO STANDING TO ATTACK THE GENERAL PROVISIONS OF THE ACT

We have shown that the penal provisions, designed to protect the public funds and applicants for loans rather than to enforce the substantive provisions of the Act, are separable from the remainder of the Act. But, whether or not a decision as to separability be made, petitioner does not have the capacity to assail these general provisions unless she can show that she is affected by them.

1. The opposing argument would apparently have to be that provisions which are unconstitutional and inseparable make the statute void as a whole, so that it can be attacked by anyone to whom any inseparable part of it is applied. This argument mistakes the basis of the doctrine restricting

the capacity to raise constitutional questions. One who seeks to challenge a statute cannot, of course, gain a standing merely by showing that it is unconstitutional. No more does he gain a standing merely by showing that he is affected or injured by some other part of the statute. He must show that he is injured by the parts which he asserts to be unconstitutional if his complaint is to be heard. To say that one may challenge any inseparable part of the statute is to confuse the *effect* of a decision of unconstitutionality with the power to *invoke* a decision as to constitutionality. That power, as this Court has often held, is limited to those whose injury may be traced to the unconstitutional provision itself.

This rule has been applied whether or not the unconstitutional aspects of the statute are inseparably linked to those affecting the assailant. Thus, in *New York ex rel. Hatch* v. *Reardon,* 204 U. S. 152, 160, 161, this Court said that

> unless the party setting up the unconstitutionality of the state law belongs to the class for whose sake the constitutional protection is given, or the class primarily protected, this court does not listen to his objections, and will not go into imaginary cases, notwithstanding the seeming logic of the position that it must do so, because if for any reason, or as against any class embraced, the law is unconstitutional, it is void as to all. * * * If the law is valid when confined

> to the class of the party before the court, it may be more or less of a speculation to inquire what exceptions the state court may read into general words, or how far it may sustain an act that partially fails.

See also *Dillingham* v. *McLaughlin,* 264 U. S. 370, 374. Again, in *Yazoo and M. V. R. Co.* v. *Jackson Vinegar Co.,* 226 U. S. 217, Mr. Justice Van Devanter stated for the Court (pp. 219–220):

> Of course, the argument to sustain the contention is that, if the statute embraces cases such as are supposed, it is void as to them, and, if so void, is void *in toto.* But this court must deal with the case in hand and not with imaginary ones. It suffices, therefore, to hold that, as applied to cases like the present, the statute is valid. How the state court may apply it to other cases, whether its general words may be treated as more or less restrained, and how far parts of it may be sustained if others fail are matters upon which we need not speculate now.

This policy is equally applicable to Federal statutes, where the court is free to interpret the extent of their coverage. In *Heald* v. *District of Columbia,* 259 U. S. 114, it was held that a resident of the District of Columbia could not challenge a local taxing statute on the ground that it was invalid as applied to non-residents. The District argued that the provisions assailed were severable. But the Court did not stop to determine whether or not they were separable, and instead ruled that the

taxpayer had not shown that he was "within the class of persons with respect to whom the act is unconstitutional" (p. 123). And in *Virginian Railway Co.* v. *Federation,* 300 U. S. 515, the employer was held unable to attack a provision, which was applied to it, on the ground that it violated the constitutional immunity of its employees, although it is obvious that, the same provision being involved, it could not be argued to have separable application to the employer and to the employees. See, to the same effect, *Jeffrey Mfg. Co.* v. *Blagg,* 235 U. S. 571, 576; *Rail Coal Co.* v. *Ohio Industrial Commission,* 236 U. S. 338, 349; cf. *Erie R. R. Co.* v. *Williams,* 233 U. S. 685, 705.

2. It follows that, whether or not Sections 8 (a) and 8 (e) are separable from the general provisions of the Act, or even if they should be held inseparable, the Court must consider whether petitioner has a standing to challenge these latter provisions. We think it plain that petitioner can show no injury from any part of the Act other than the penal provisions designed to protect the public funds and the applicants for loans. Accordingly, she is without power to question the other provisions.

The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he personally has been or will be injured by its operation. See, e. g., *Henderson* v. *Tennessee,* 10 How. 311, 323; *Tyler* v. *The Judges,* 179 U. S.

405; *McCabe* v. *Atchison, T. & S. F. R. Co.*, 235 U. S. 151, 162; *Hendrick* v. *Maryland*, 235 U. S. 610, 621; *Liberty Warehouse Co.* v. *Burley Tobacco Growers' Co-Op. Assn.*, 276 U. S. 71, 88. And even if a statute is applied to the assailant, he cannot question its validity unless he is affected by the unconstitutional feature of the statute. "As they do not belong to the class for whose sake the constitutional protection would be given, if it would, they cannot complain on that ground." *Darnell* v. *Indiana*, 226 U. S. 390, 398.

Familiar application of the latter principle is found in decisions refusing to consider whether a statute violates the equal protection clause at the instance of one who is clearly not a member of the class allegedly discriminated against, see e. g., *Cronin* v. *Adams*, 192 U. S. 108, 114; *Morf* v. *Bingaman*, 298 U. S. 407, 413, or who fails affirmatively to show that he is a member of the class discriminated against, see e. g., *Standard Stock Food Co.* v. *Wright*, 225 U. S. 540, 550; *Bosley* v. *McLaughlin*, 236 U.S. 385, 395. The requirements of the due process clause as applied to others will not be investigated at the behest of one whose property is not arbitrarily taken, see *Aetna Ins. Co.* v. *Hyde*, 275 U. S. 440, 447, 448, or who has been excepted from the operation of the provision assailed for vagueness, see *Gorieb* v. *Fox*, 274 U. S. 603, 606. The interstate commerce clause provides no shelter where the transaction at bar is intrastate, see *New*

York ex rel. Hatch v. *Reardon*, 204 U. S. 152, 160; *Missouri, Kan. & Tex. Ry. Co. of Texas* v. *Cade*, 233 U. S. 642, 648. An employer may not advance the constitutional immunity of his employees, *Jeffrey Mfg. Co.* v. *Blagg*, 235 U. S. 571, 576; *Virginian Ry.* v. *Federation*, 300 U. S. 515, 558. The doctrine applies to Federal statutes as well as State acts, *Blair* v. *United States*, 250 U. S. 273, 279; *Heald* v. *District of Columbia*, 259 U. S. 114, 123; *Virginian Ry.* v. *Federation, supra.*

Petitioner does not and cannot demonstrate that the operations of the Home Owners' Loan Corporation caused her direct and personal harm, or threatened so to do. When the Corporation issued bonds, when it advanced cash to home owners, when it distributed its bonds to mortgagees willing to accept them in lieu of their lien and the home owner's promise, petitioner was not in any way interested or affected. She therefore has no standing to attack the constitutionality of the substantive provisions of the Act.

C. PETITIONER IS ESTOPPED TO ATTACK THE REMAINDER OF THE ACT

Irrespective of the questions of separability and standing to complain, the petitioner is estopped to attack the parts of the statute under which she sought to obtain benefits.[20]

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[20] This argument is also covered in the Government's brief in *United States* v. *Kapp*, No. 97, this Term, pp. 25–30.

Counts five and fifteen of the indictment charged that petitioner filed with the Home Owners' Loan Corporation a consent to take bonds of the Corporation as a refunding of her mortgage lien (R. 14–15; 32–33). By filing these consents, petitioner took appropriate steps under the statute for the purpose of obtaining a benefit; the exchange of her mortgage notes for the corporation bonds, which bore the promise of a financially responsible party and were guaranteed by the Government. By taking such action in quest of benefits under the statute, petitioner has estopped herself from attacking it.

Apart from the rule that one may not both rely upon and assail an enactment in the same proceeding, *Hurley* v. *Commission of Fisheries*, 257 U. S. 223, 225, it is well settled that one who has availed himself of the benefits of a statute is estopped to question its constitutionality. *Daniels* v. *Tearney*, 102 U. S. 415, 421; *Grand Rapids & Indiana Ry. Co.* v. *Osborn*, 193 U. S. 17, 29; *Kansas City &c. R. Co.* v. *Stiles*, 242 U. S. 111, 117; *Pierce Oil Corp.* v. *Phoenix Refining Co.*, 259 U. S. 125, 128–129; *St. Louis Co.* v. *Prendergast Co.*, 260 U. S. 469, 472–473; cf. *Eliason* v. *Wilborn*, 281 U. S. 457, 459–460. It does not appear that petitioner actually received benefits (the bonds of the Corporation), but the doctrine of estoppel applies equally to one who has taken action under the statute in quest of such benefits. *Great Falls Mfg. Co.* v. *Attorney Gen-*

eral, 124 U. S. 581, 598–600; *Wall* v. *Parrot Silver & Copper Co.*, 244 U. S. 407, 411–412; *United Gas Co.* v. *Railroad Comm.*, 278 U. S. 300, 307–308; cf. *Booth Fisheries* v. *Industrial Comm.*, 271 U. S. 208.

In both the *Great Falls Mfg. Co.* and *Wall* cases a party who had instituted a proceeding prescribed by statute for the determination of damages suffered from the loss of property rights was held unable to maintain a separate suit attacking the constitutional sufficiency of the statutory procedure to provide adequate remuneration, though the proceedings had not yet culminated in an award, and no benefits had been received. In the *United Gas Co.* case, because a gas company had petitioned a state commission to establish higher rates or permit withdrawal from service, it was held unable, in a suit to set aside the commission's order denying it relief, to assail the statute creating the commission, or the statute prohibiting any public service company which had continued its service after the expiration of its franchise partially to withdraw from such service without permission of the commission.

It is true that, in permitting one who has applied under a statute for a license to do business to have its enforcement enjoined on the ground that a license could not constitutionally be required, this Court has pointed out that it is unsound to say that "one who invokes the provisions of a law may not thereafter question its constitutionality." *Buck* v.

Kuykendall, 267 U. S. 307, 316; see also *City of Newark v. Central R. Co. of New Jersey,* 267 U. S. 377, 385. But a licensing statute is open to the distinction that it merely delimits the freedom to engage in business, with the result that the application for a license is not intended to secure any benefits and does not contemplate a more advantageous situation than that which existed before the passage of the Act. Where one has invoked the statute in an attempt to obtain manifest benefits, the estoppel doctrine applies.

On principle as well as authority it seems that a party should not be able to assume inconsistent positions, first to rely on a statute and later to assail it, even though he has failed to secure the benefits which he sought under the statute.[21] It is believed that the correct doctrine is that stated in the

[21] The power to claim a constitutional right may be barred "by deliberate election or by conduct inconsistent with the assertion of such a right." *Pierce Oil Co.* v. *Phoenix Refining Co.*, 259 U. S. 125, 128–129.

In *Great Falls Mfg. Co.* v. *Attorney General*, 124 U. S. 581, the Court emphasized the inconsistency of the corporation's position: it had previously acquiesced in the taking of the property, and the procedure before the Court of Claims; it could not now bring a suit proceeding on the ground that there had been no lawful taking (pp. 598, 600). The Court stated that the corporation should have stood upon its constitutional rights in the first place, if it desired to urge them (p. 600). In *Wall* v. *Parrot Silver & Cooper Co.*, 244 U. S. 407, the Court stated (p. 412): "They cannot claim the benefit of statutes and *afterwards* successfully assert their invalidity." [Italics added.]

more recent decision of *United Gas Co.* v. *Railroad Commission,* 278 U. S. 300, 307–308:

> It is the rule of this Court, consistently applied, that one who has invoked action by state courts or authorities under state statutes may not later, when dissatisfied with the result, assail their action on the theory that the statutes under which the action was taken offend against the Constitution of the United States. * * *

None of the other factors in the instant case precludes the application of the doctrine of estoppel. It applies to Federal as well as State statutes. *Great Falls Mfg. Co.* v. *Attorney General,* 124 U. S. 581; *American Bond & Mortgage Co.* v. *United States,* 52 F. (2d) 318, 321 (C. C. A. 7th); see *Hirsh* v. *Block,* 267 Fed. 614, 618 (App. D. C.), reversed on another ground, 256 U. S. 135; cf. *Humbird* v. *Avery,* 195 U. S. 480. We see no reason why the doctrine should not apply in a criminal prosecution, where the defendant has accepted the benefits of or invoked the statute, as well as in a civil proceeding.[22] See *Kluczek* v. *State,* 115 N. J. L. 105, 111; *Ingles* v. *People,* 90 Colo. 51, 56–57; *Jannett* v. *Windham,* 109 Fla. 129, 130[23]; *State* v. *Stone,* 46 La. Ann. 147, 150.

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[22] In addition may be cited several criminal cases precluding a defendant from relying on and assailing the statute in the same proceeding. *Hunt* v. *State,* 186 Ind. 644; *State* v. *Collins,* 225 Mo. 633; *Ayers* v. *Newark,* 49 N. J. L. 170; *State* v. *Board of Police Com'rs,* 56 N. J. L. 258.

[23] In rehearing, as an alternative ground of decision, the State court examined the statute and held it consonant with

It should be noted that we do not argue that petitioner is estopped to challenge the validity of Sections 8 (a) and 8 (e), under which she was convicted. We urge only that the rule announced in these cases precludes petitioner from assailing the other provisions of the statute, under which she has sought to obtain benefits. Compare *State* v. *Stone, supra.*

V

The Home Owners' Loan Corporation Is Constitutional

In our view of the issues presented by this case, the constitutionality of the Home Owners' Loan Corporation may not be considered by this Court. However, since the court below examined the constitutional questions, we shall present a discussion designed to demonstrate that the Corporation served to carry out (1) the fiscal powers of Congress and (2) the power of Congress to impose taxes and appropriate money to provide for the general welfare.

A. INTRODUCTORY

1. *The Occasion for the Act.*—The Home Owners' Loan Corporation was designed to afford an opportunity for the necessitous urban home owner, who occupied his own home, to refinance his mortgage indebtedness. We think it important to

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the Federal Constitution, and on this ground the judgment was affirmed, 290 U. S. 602.

sketch the economic conditions which led to its creation.

Debts secured by liens upon real estate (hereafter called mortgage debts) form the major part of the long term non-governmental indebtedness of the nation. It was estimated in 1934 that of the $74,900,000,000 outstanding debt of this nature, $38,200,000,000, or 51 per cent, represented mortgage debts of various kinds. Of this latter amount, $17,700,000,000 was estimated to be represented by mortgages on urban homes (dwellings for one to four families); this is 46 per cent of the mortgage debt, and 24 per cent of the total non-governmental debt.[24]

The distribution of urban home mortgages among the various types of lenders in 1933 may roughly be taken to be as follows:[25]

Savings banks and trust companies	21%
Individuals	20%
Commercial banks	17%
Life insurance companies	16%
Building and loan associations	14%
Mortgage companies	7%
Others	5%

[24] The figures in this paragraph are taken from Long-Term Debts in the United States Department of Commerce, Bureau of Foreign and Domestic Commerce (1937), p. 6. The data relate to 1934, since there is no equally reliable estimate for 1933, when the Corporation was created, but they should serve to give a substantially accurate picture of the amount and relative importance of urban home mortgages in the preceding year.

[25] This table is taken from Financial Survey of Urban Housing, Department of Commerce (1937), p. xix. This table embraces data covering 52 cities on January 1, 1934. The 3.3 per cent holding of the H. O. L. C., shown by the table, was distributed by us proportionately among the other

The tremendous investment in home mortgages represented a borrowing of corresponding importance to the home owners of the nation. In 1930 there were about 23,200,000 non-farm homes in the United States, of which about 11,500,000 were occupied by the owner.[26] Of the owner-occupied urban homes, about 58 per cent were mortgaged in 1933, the indebtedness averaging about 56 per cent of the value of the mortgaged property.[27] These mortgaged homes which are occupied by the owners house a total of about 23,000,000 persons,[28] constituting about 19 per cent of the total population.[29]

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classifications to reflect the situation in 1933. The table itself gives results for the above classifications of, respectively, 20.4, 19.7, 16.5, 15.0, 13.6, 7.1, and 4.4 per cent. See also the estimates found in Long-Term Debts in the United States, Dept. of Commerce (1937), p. 140; Senate Hearings on the National Housing Act (S. 3603), 73d Cong., 2d Sess., p. 20.

[26] Abstract of the Fifteenth Census, Dept. of Commerce (1933), p. 405, gives the respective figures as 23,235,982 and 10,503,386.

[27] Financial Survey of Urban Housing, Dept. of Commerce (1937), p. xviii, gives the respective figures for January 1, 1934, as 58.3 and 55.6 per cent. This survey is based upon a thorough canvass in 52 typical cities distributed throughout the country. The cities comprise a group of somewhat larger than average size and the result probably shows a larger percentage of debt than would a complete survey of all urban communities.

[28] The Fifteenth Census, Dept. of Commerce, Vol. VI, "Families," Table 20, p. 14, indicates an average of 3.82 persons per urban family in 1930. This figure, multiplied by 58 per cent of 10,500,000 or 6,090,000, gives 23,263,800.

[29] The total population was 122,775,046 in 1930 (Abstract of the Fifteenth Census, Dept. of Commerce, p. 10).

It is evident that the solvency of the financial institutions and the housing of an important fraction of the population were alike intimately dependent upon the maintenance of a tolerably healthy mortgage investment field. Yet the volume of foreclosures was mounting at an alarming rate. During 1926, which may be taken as a typical year, an estimated 68,100 homes were foreclosed in the United States. During 1932 this figure had increased to 248,700. By June of 1933 foreclosures were occurring at an estimated rate of 24,000 a month.[30] When it is remembered that many mortgagees refused to foreclose in spite of the borrower's default because of the low value of real estate generally, these figures are seen considerably to understate the actual number of home mortgages seriously in default.

The only comprehensive survey of urban home mortgage defaults[31] indicates that, of the urban

[30] The figures in this paragraph are largely taken from H. O. L. C. Summary of July 22, 1936. They are estimates made by the Federal Home Loan Bank Board based upon reports of local officers in over 1,000 communities (including over half of the population). Published figures, averaging about 8 per cent higher than these revised data, may be found in the House Hearings on the National Housing Act (H. R. 9620), 73d Cong., 2d Sess., p. 63. Monthly figures in 1933 are taken from the Hearings and adjusted by us.

[31] Financial Survey of Urban Housing (Dept. of Commerce, 1937). The study covers 22 typical cities (ranging in size from Casper, Wyoming, to Cleveland, Ohio, and in location from Portland, Maine, to San Diego, California)

homes on which there was a first mortgage and which was occupied by the owner, 43.8 per cent were in default.[32] The average period of back payments in which the defaulting mortgagor was in arrears was 15 months.[33] The situation with respect to second and third mortgages was even worse; 54.4 per cent of the urban homes occupied by their owners and subject to second or third mortgages were in default,[34] and were in arrears

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and relates to January 1, 1934. While it does not, of course, show the national picture with complete accuracy, there is no reason to believe the results are not typical.

[32] The figure is our own computation and is derived from Tables 36 and 40 (repeated for each city) in the Financial Survey of Urban Housing. Tables 36 cover owner-occupied homes on which there is a first mortgage or trust deed, and Tables 40 cover such homes on which there is a purchase agreement lien. If these tables be totalled, they indicate that of 48,197 reporting mortgagors, 21,103 were in default. The resulting 43.8 per cent default may be compared with the 46.9 per cent of rented houses subject to similar liens which were in default (Tables 37 and 41; 9,045 reporting, 4,238 in default).

[33] Tables 36 and 40 of the Survey give the average period for each city. These figures were averaged, weighting them according to the number of defaults in each city, to give a national figure. The average of 15 months may be compared with the average of 16 months arrears in the case of mortgage defaults on rented houses (Tables 37 and 41, similarly computed).

[34] Tables 38 of the Survey give a total of 4,855 such homes which reported, of which 2,640 were in default. The resulting figure of 54.4 percent may be compared to the 64.2 percent of rented houses subject to such mortgages which were in default (Tables 39; 494 reporting, 317 in default).

an average of 18 months.[35] In result, it may be said that almost half of the urban home owners whose property was mortgaged were in serious default in their payments.[36] This meant that about one-fourth of the urban home owners in the country were in greater or less danger of losing their homes. The gravity of such a crisis needs no characterization.

A considerable measure of relief had been extended to the institutional mortgagees through the establishment of the Federal Home Loan Bank System in 1932. The Act of July 22, 1932, c. 522, 47 Stat. 725, established a system of 8 to 12 Federal Home Loan Banks, under supervision of the Federal Home Loan Bank Board. Building and loan associations, cooperative banks, savings banks, and insurance companies were eligible for membership in the system. The Banks were to make loans on notes secured by first mortgages on urban homes. By June 1, 1933, the Banks had extended $132,937,197 of credit to their member institutions.[37]

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[35] Tables 39 of the Survey give the average period for each city. These figures were average, weighting them according to the number of defaults in each city, to give the national figure. The average of 18 months may be compared with the average of 19 months arrears in the case of such defaults on rented houses (Tables 39, similarly computed).

[36] It is to be noted that these figures do not include the 3.3 per cent of urban mortgages held by the H. O. L. C., most of which were probably in default in 1933 (See footnote 24, *supra*).

[37] First Annual Report of Federal Home Loan Bank Board, p. 16.

It will be observed that the Home Loan Bank System assisted in maintaining the solvency of institutional mortgagees which possessed sound mortgage investments but were in need of cash. It was essentially a means for establishing liquidity by means of a central bank of discount. However, the relief afforded by the Home Loan Bank system was obviously inadequate to meet the needs of the continuing crisis. (1) It offered no relief to the mortgagor who was in default.[38] (2) It did little to stem the tide of foreclosures, since it contained no provision which might deter the mortgagee from foreclosing on defaulted loans. (3) Since the volume of foreclosures continued unabated, the distress sales of urban realty continued without check, steadily driving down the value of the realty securing other mortgage loans. This weakened the security back of the loans by institutional mortgages, thus jeopardizing their basic solvency and making maintenance of liquidity more difficult through reducing the volume of paper eligible for rediscount by the Home Loan Bank system. (4) The shrinking real estate values made refinancing by the home owner virtually impossible, even though he had repaid much of the principal of the loan, and by a cumulative process led to further foreclosures and

[38] Section 4 (d) purported to permit loans to individual home owners unable to borrow elsewhere. But of 41,000 applications, only 3 loans were granted under the severe restrictions of the Act and Regulations. H. O. L. C., Purposes and Accomplishments (1936), p. 2.

a further diminution in the market value of urban real estate.

The Home Owners' Loan Act of 1933 was thus designed to supplement the Home Loan Bank System and to provide a partial remedy for this growing tide of mortgage defaults and foreclosures, which was impairing the solvency of the financial institutions of the nation and threatening to cause loss of their home ownership by hundreds of thousands of its citizens.[39]

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[39] Other measures were adopted during the depression years to remedy the urban home mortgage crisis. They include the following: (1) A system of Federally incorporated and supervised savings and loan associations was established. Act of June 13, 1933, c. 64, 48 Stat. 128, amended by Acts of April 27, 1934, c. 168, 48 Stat. 643, and of May 28, 1935, c. 150, 49 Stat. 293. Some 1,135 associations, with assets of $657,534,365 had been chartered on June 30, 1936. Fourth Annual Report of Home Loan Bank Board, p. 27. (2) A Federal Savings and Loan Insurance Corporation, designed to insure the shares and accounts of Federal savings and loan associations, and of state associations which met the requirements, was established. Act of June 27, 1934, Title V of c. 847, 48 Stat. 1246, amended by Act of May 28, 1935, c. 150, 49 Stat. 293. The Corporation on June 30, 1936, had, in addition to the Federal associations, 237 state incorporated members and assets of $104,362,011.84. Fourth Annual Report of Home Loan Bank Board, pp. 46, 47. (3) The Federal Housing Administration was established, whose chief functions were to insure, after appraisal, private loans for (a) repair and modernization of homes and other buildings, (b) long term mortgage loans on homes, and (c) mortgage loans on large scale housing projects. Act of June 27, 1934, 48 Stat. 1246, amended by Acts of May 28, 1935, c. 150, 49 Stat. 293, of August 23, 1935, c. 614, 49 Stat. 684, of April 3, 1936, c. 165, 49 Stat. 1187, and of April 17,

2. *The Terms of the Act.*—The Home Owners' Loan Act of June 13, 1933 (c. 64, 48 Stat. 128), provided in Section 4 for the creation of the Home Owners' Loan Corporation. The provisions of this section as originally enacted may be summarized as follows:[40]

The Federal Home Loan Bank Board was to create the Corporation, and the members of the Board were to serve as directors. (Subd. (a).) Its capital stock, not to exceed $200,000,000 was to be determined by the Board and subscribed by the Secretary of the Treasury on behalf of the United States. (Subd. (b).) The Corporation was authorized to issue bonds in an amount not to exceed $2,000,000,000, to be guaranteed as to interest by the United States, for terms of not more than 18 years. The bonds were to be tax-exempt, as was all property of the Corporation except its real estate. (Subd. (c).)

During a period of three years after the enactment, the Corporation was authorized to exchange its bonds for mortgages on urban homes. The homes must have been occupied by the owner, and of a value of less than $20,000. No more than

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1936, c. 234, 49 Stat. 1232. By the end of 1936 a total of $1,139,335,659 in notes and mortgages had been accepted for insurance, distributed in the above types as follows: (a) $500,220,642, (b) $609,044,017, and (c) $30,071,000. Third Annual Report of Federal Housing Administration, p. 7.

[40] The full text of the relevant sections of the Act, as subsequently amended, is found in the Appendix, *infra*, pp. 104–120.

$14,000, or an amount equal to 80 per cent of the value of the real estate, was to be offered in any one case. The Corporation also could advance cash to meet the incidental expenses of the transaction, to pay taxes and to provide for necessary maintenance and repairs. The mortgages so acquired by the Corporation were to be amortized within a period of 15 years, and interest was not to exceed 5 per cent. (Subd. (d).)

The Corporation also could make cash loans, up to 50 per cent of the value of the property, when secured by a first mortgage such as that described above (Subd. (e)). When a mortgagee refused to accept the Corporation bonds, and the home owner could not borrow elsewhere, the corporation was empowered to advance not over 40 per cent of the value of the property for the purposes specified in subdivision (d), to be secured by a first mortgage (Subd. (f)). It was further authorized to exchange bonds and to advance cash to enable the owners to redeem homes foreclosed within the preceding two years (Subd. (g)). All powers specified in this paragraph could be exercised only within three years of the enactment of the Act.

The Corporation was directed to retire its bonds and capital stock as rapidly as possible. On approval of the Board it could pay dividends on the stock. Any surplus after liquidation was to be paid into the Treasury (Subd. (h)).

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By the Act of April 27, 1934, (c. 168, 48 Stat. 643) the original Act was amended (Sec. 1) to provide that the bonds should be guaranteed by the United States as to principal as well as to interest. Section 2 added new subdivisions to the original Section 4 which required that relief be offered only to mortgagors shown to be necessitous, or where the mortgages were held by an institution in liquidation (Subd. (l)), and which authorized the Corporation to make cash advances (up to $200,000,000) and exchange bonds for the rehabilitation and modernization of the homes and real estate financed (Subd. (m)). Owners whose homes were foreclosed subsequent to January 1, 1930, were made eligible for loans for the purpose of redemption (Sec. 4). The Federal Reserve Banks were authorized to rediscount member bank paper secured by bonds of the Corporation, directly to purchase these bonds, and to act as fiscal agents of the Corporation (Secs. 7, 8). The Corporation was authorized to purchase up to $50,000,000 of the bonds of the Federal Home Loan Banks (Sec. 9).

By the Act of June 27, 1934 (c. 847, 48 Stat. 1246, 1256, 1263–1264), the Corporation was directed in Section 402 (b) to subscribe $100,000,000 for the entire capital stock of the Federal Savings and Loan Insurance Corporation. By Section 506 the amount of bonds which the Corporation was authorized to issue was increased to $3,000,000,000, and the amount available for cash advances for

rehabilitation and modernization was increased to $300,000,000. By the Act of May 28, 1935 (Secs. 11, 16, c. 150, 49 Stat. 293), these amounts were increased, respectively, to $4,750,000,000 and $400,000,000, and a new subdivision (n) added to the original Section 4, authorizing the purchase up to $300,000,000 of Federal Home Loan Bank bonds and the shares of Federal savings and loan associations and members of the Home Loan Bank System. The preferred status accorded institutional mortgagees in liquidation was withdrawn (Sec. 14.)

3. *Operations of the Corporation.*—The lending operations of the Corporation were limited to three years from the enactment of the Home Owners' Loan Act, and terminated on June 13, 1936. In this period it issued bonds (excluding refunding) in the amount of $3,048,369,550.[41] Applications for refinancing and reconditioning loans were received from 1,886,491 home owners, totalling $6,173,355,625. An aggregate amount of $3,093,288,213 was granted to 1,018,171 applicants. Homes were refinanced in every State, ranging in volume from 1,206 homes in Nevada to 98,557 in Ohio, and in Alaska, Hawaii, Puerto Rico, and the District of Columbia. The loans averaged $3,028 in amount.[42]

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[41] Fourth Annual Report of Federal Home Loan Bank Board, p. 127.

[42] These figures are taken from Final Summary of Financing Operations, H. O. L. C., Dec. 4, 1936.

The loans bear 5 per cent interest and most of them are repayable in equal monthly installments of $7.91 per $1,000 of original loan for a period of 15 years.[43] The Corporation bonds have been exchanged with mortgagees who have surrendered obligations of a face value averaging about 8 per cent above that of the Corporation bonds, and bearing interest rates averaging over 6 per cent.[44]

In consequence of these operations, the Corporation has acquired about one-sixth of the urban home mortgage debt of the nation. It has been estimated that one out of every ten homes occupied by their owners has been refinanced through a mortgage to the Corporation.[45]

The rapidly accelerating rate of urban foreclosures was checked in the latter part of 1933, following the creation of the Corporation. Urban home

[43] Fourth Annual Report of Federal Home Loan Bank Board, p. 30.

[44] *The Final Summary of Financing Operations*, H. O. L. C., Dec. 4, 1936, states that the average amount of the application was $3,272 and the average value of the loan granted was $3,028. We are informed that this is a reasonably accurate, and the best available measure of the reduction in principal effected on the exchange. The estimate of the interest rate on the exchanged mortgages is taken from H. O. L. C., *Purposes and Accomplishments*, p. 7. *Financial Survey of Urban Housing*, Dept. of Commerce (1937), p. xviii, indicates an average contract rate of 6.18 per cent in the 52 cities surveyed.

[45] H. O. L. C., *Purposes and Accomplishments*, p. 5; *Long Term Debts in the United States*, U. S. Dept. Commerce, Bureau of Foreign and Domestic Commerce, 1937, p. 143.

mortgage foreclosures, estimated at 24,000 in June 1933, dropped to about 20,700 in July and to about 19,200 in August of 1933.[46] The decline in home mortgage foreclosures in metropolitan communities was even more abrupt.[47] By the end of the lending life of the Corporation, in June 1936, the estimated total of urban homes foreclosed had declined to 15,716 in June of 1936.[48] While not all of this improvement can be said to be due to the Corporation alone, the importance of its aid is evident.

It is apparent that the Corporation played a very significant role in alleviating the condition of financial institutions during the crisis of 1933 and that its refinancing of home mortgages eliminated the most calamitous aspect of the economic depression, the danger of eviction from their homes, for over a million hard-pressed home owners. The Government submits that this activity was clearly within the constitutional powers of the Federal Government. Such has been the decision of every court which has considered the question.[49]

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[46] H. O. L. C. Summary of, July 22, 1936. See footnote 29, *supra*.

[47] *Long-term Debts in the United States*, Dept. of Commerce, Bureau of Foreign and Domestic Commerce (1937), p. 147.

[48] *Monthly Estimated Number of Non-Farm Real Estate Foreclosures*, H. O. L. C., Nov. 25, 1936.

[49] In addition to the decision of the court below, the following cases and opinions have upheld the constitutionality of the H. O. L. C.: *United States ex rel. Handler* v. *Hill*, 90

B. THE ACT IS A CONSTITUTIONAL EXERCISE OF THE FISCAL POWERS

The history of Federal financial institutions and fiscal agencies is almost as long as that of the central Government itself. The mere names of these

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F. (2d) 573 (C. C. A. 3d), certiorari denied because filed too late, No. 416, October Term, 1937, holding that the power to make loans includes the power to forbid fees for securing them; *Home Owners Loan Corporation* v. *Gregory* (S. Ct. of Tenn., not yet reported, decided June 17, 1937), granting a writ of eviction after foreclosure; *Home Owners Loan Corporation* v. *Megliola* (Mun. Ct., W. Roxbury, Mass., decided May 21, 1937), mortgagor also held estopped to challenge validity; *Home Owners Loan Corporation* v. *Sapin* (App. Dept., S. Ct., Los Angeles County, Cal., decided August 31, 1937); *Home Owners Loan Corporation* v. *Hudson* (S. Ct. Los Angeles County, Cal., decided March 18, 1937); 37 Op. A. G. 241, sustaining the validity of the H. O. L. C. and its bonds; see also Opinion of Attorney General to the President, August 26, 1935, 38 Op. A. G. —, sustaining the validity of the National Housing Act.

Other cases have reached conclusions based upon the decision that the H. O. L. C. is an instrumentality of the United States. It is not a "foreign corporation." *Home Owners Loan Corporation* v. *Shapiro* (C. Ct., Essex County, N. J.). It need not pay a "writ tax" to maintain suit. *Home Owners Loan Corporation* v. *Rebman* (L. & E. Ct., Richmond, Va., decided June 24, 1937). It cannot be garnisheed. *Home Owners Loan Corporation* v. *Hardie & Candle*, 100 S. W. (2d) 238 (Tenn.); *Malitz* v. *Freed* (Ct. App., Cuyahoga County, Ohio, decided June 29, 1935); *Donefeld's, Inc.* v. *Caulfield* (Ct. C. P., Miami County, Ohio, decided December 1936); *McLaughlin* v. *Bellew* (C. Ct., Kenty County, Mich., decided February 28, 1937); cf. *Gill* v. *Reese*, 53 Ohio App. 134, 137, holding that the H. O. L. C. can be garnisheed although "there can be no question but that the corporation is an instrumentality of the government, engaged in a great undertaking affecting the public."

institutions summon to mind the historic periods and crises of the nation: in 1816 the Bank of the United States, in 1863 the National Banking Associations, in 1913 the Federal Reserve System, in 1916 the Federal Land Bank System, in 1917 the War Finance Corporation, in 1932 the Reconstruction Finance Corporation and the Federal Home Loan Bank System, and in 1933 the Federal Deposit Insurance Corporation. The Government submits that the Home Owners' Loan Corporation, designed as it is to preserve the solvency of financial institutions and to support the credit structure of the nation, was merely another step in this continuing protection and support which the United States offers the credit mechanism through which all activities, whether private, State, or Federal, in this day must proceed.[50]

We think it probably unnecessary precisely to trace the causal lines which flow from the functions of the Home Owners' Loan Corporation and thereby to demonstrate its exercise of the fiscal powers granted in Section 8 of Article I. For this Court has aptly characterized the sweeping reach of combined federal powers to regulate the currency, to

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[50] The recognized fact that over 90 per cent, by dollar volume, of all transactions are made by means of check (see, e. g., Hearings on Banking Bill of 1935 (H. R. 5357), 74th Cong., 1st Sess., p. 213) seems of itself to be ample documentation of the fact that maintenance of credit institutions is indispensable to the federal powers to regulate currency, to borrow and to tax.

borrow and to tax. In *Norman* v. *Baltimore & Ohio R. Co.*, 294 U. S. 240, 303, it said:

> The broad and comprehensive national authority over the subjects of revenue, finance and currency is derived from the aggregate of the powers granted to the Congress.

These powers, it must further be noted, are "not stereotyped as of any particular time" but furnish "a perpetual and living sanction" to Congress to consider "the changing wants and demands of society and to adopt provisions appropriate to meet every situation which it was deemed required to be provided for." *First National Bank* v. *Union Trust Co.*, 244 U. S. 416, 419.

Given the broad and flexible fiscal powers, given the importance of urban mortgage credit to the banking system, and given the distressed condition of the urban mortgage market, we think there need be no further inquiry as to the constitutionality of the Home Owners' Loan Corporation. But, to err on the side of caution, the succeeding pages of this section are designed more precisely to demonstrate that the Corporation is (1) an important adjunct of the Federal Home Loan Bank System, the constitutionality of which is not disputed, and (2) a valid fiscal agency, even apart from its relationship to this System.

1. *An Adjunct of the Home Loan Bank System.*—Petitioner apparently concedes the constitutionality of the Federal Home Loan Bank Sys-

tem (Br. 13–18, 17). Indeed, there hardly could be a substantial question on this score in view of the close analogy the Home Loan Bank System bears to the Federal Farm Loan System, upheld in *Smith* v. *Kansas City Title & Trust Co.*, 255 U. S. 180. It is our view that the Home Owners' Loan Corporation is a necessary or appropriate adjunct to the Home Loan Bank System during a time of financial crisis, and that the undisputed constitutionality of the latter necessarily covers the Corporation as well.

It is significant that it was recognized from the outset that direct relief to the home owner was an aid in the successful operation of the Home Loan Bank System. Section 4 (d) of the Federal Home Loan Act (c. 522, 47 Stat. 725) contained a provision designed to permit direct relief to home owners, but this was found inadequate in practice (see footnote 38, *supra*, p. 70). Section 4 of the Home Owners' Loan Act, directing the creation of the Corporation, whose directors were to be the members of the Federal Home Loan Bank Board, was designed to afford a practicable and large scale substitute for the earlier Section 4 (d), which accordingly was repealed (Section 3, c. 64, 48 Stat. 128).

It requires, we believe, no argument to demonstrate that a Federal banking system designed to preserve the liquidity and solvency of financial institutions which lend on mortgage notes cannot suc-

cessfully operate so long as the underlying mortgage collateral is unsound or in default. In a period of widespread default and foreclosure, with the resulting distress sale of real property which in turn forces down the value of the collateral behind other notes, there can be no satisfactory means of preserving the institutional mortgages which does not serve also to mitigate the distress of the mortgagor. The possibility of obtaining cash advances on acceptable mortgage notes is an illusory or, at most, but a temporary salvation for institutions which see an ever increasing number of their borrowers go into default, and for whom foreclosure cannot afford relief because of the low values to which the real estate had been driven. The privilege of rediscount is a palliative only, and is, moreover, one which in times of prolonged economic depression becomes of steadily diminishing utility.[51]

It seems necessarily to follow, since Congress can constitutionally offer liquidity to institutional mortgagees, that as an auxiliary to that activity it

[51] The experience of the Reconstruction Finance Corporation offers an illuminating parallel. Its authority to make loans to financial institutions, contained in the original Act (c. 8, Sec. 5, 47 Stat. 5), was found to be only partially effective in relieving the threatened insolvency of these institutions, with the result that direct subscription to preferred stock was found desirable (c. 1, Sec. 304, 48 Stat. 1). See statements of Jesse H. Jones, Chairman of R. F. C., reprinted in Cong. Rec., Vol. 81, p. 9766 (daily ed., July 23, 1937); Cong. Rec., pt. 9, App., p. 115; New York Times, Sept. 6, 1933, p. 38, col. 3.

can reach into the economic situation which created the necessity for the Home Loan Bank System and establish a subsidiary for financing mortgagors, thus averting defaults upon such a wide scale that the privilege of rediscount might become meaningless. The Home Owners' Loan Corporation, accordingly, represents a direct attack upon the conditions which made the Home Loan Bank System imperative, and should be viewed as a buttress to support the operations of that System.

In addition to this direct attack on the distressed mortgage situation, the Corporation was empowered to purchase the bonds of the institutions comprising the Home Loan Bank System. The Act of April 27, 1934, authorized the purchase of Federal Home Loan Bank bonds, the Act of June 27, 1934, in addition directed subscription to the stock of the Federal Savings and Loan Insurance Corporation, and the Act of May 28, 1935, authorized the purchase of shares of the Federal savings and loan associations. In *Smith* v. *Kansas City Title Co.*, 255 U. S. 180, 211, the power of the Federal Land Banks to purchase United States bonds was held to be an important indication of their functions as a valid fiscal agency. A corresponding power in the Corporation to purchase bonds and subscribe to the stock of these other institutions of the Home Loan Bank System must necessarily make the Corporation an appropriate agency to aid in their financial

operations,[52] just as the Federal Land Banks are for that reason an appropriate fiscal agency of the United States.

We do not anticipate that petitioner will deny that the Corporation had at least some effect in bulwarking and supplementing the operations of the Home Loan Bank System. The questions are thus reduced to the degree of the necessity that the Corporation be created, and to whether Congress has chosen the most appropriate method to accomplish this end. And few things are better settled than the principle that this Court will not review a decision of the Congress as to the degree of the necessity which impels it to create a fiscal agency, nor will it undertake to judge whether one method or another would have been better adapted for the occasion. *Farmers' National Bank* v. *Dearing,* 91 U. S. 29, 33–34; *Smith* v. *Kansas City Title Co.,* 255 U. S. 180, 210; *Davis* v. *Elmira Savings Bank,* 161 U. S. 275, 290; *Easton* v. *Iowa,* 188 U. S. 220, 238; cf. *Veazie Bank* v. *Fenno,* 8 Wall. 533, 548; *McCray* v. *United States,* 195 U. S. 27.

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[52] It is immaterial to the question of constitutionality whether or not these powers have actually been exercised. "The existence of the power under the Constitution is not determined by the extent of the exercise of the authority conferred under it." *Smith* v. *Kansas City Title Co., supra,* 210. However, on June 30, 1936, the Corporation had invested $52,817,100 in Federal savings and loan associations and had subscribed to $100,000,000 of stock in the Federal Savings and Loan Insurance Corporation. *Fourth Annual Report of Federal Home Loan Bank Board,* p. 130.

2. *A Fiscal Agency Itself.*—Even apart from its intimate relationship to the Home Loan Bank System, the Corporation seems to us plainly to be an important fiscal agency of the United States. It is true that nowhere is the Corporation designated as a depository of Government funds. As we read petitioner's argument (Br. 13–18), she would not deny the constitutionality of the Corporation had it so been designated, or perhaps even if it had been directed to purchase United States bonds. However persuasive the presence of these powers may be to indicate that the institution in question is a fiscal agency, see *Smith* v. *Kansas City Title Co.*, *supra*, it is evident that their absence is too rudimentary a touchstone by which to repudiate a huge financial institution, wholly owned by the United States, as unconnected with its fiscal operations. Such a conclusion can be reached only after examination of its actual operations.

However, it should again be noted that the Act of April 27, 1934, authorized the purchase of Federal Home Loan Bank bonds, the Act of June 27, 1934, directed subscription to the stock of the Federal Savings and Loan Insurance Corporation, and the Act of May 28, 1935, authorized the purchase of shares of the Federal savings and loan associations. (See *supra*, p. 83.) Even by petitioner's analysis (Br. 16–17), this would seem to make the corporation a valid fiscal agency on and after April 27, 1934. Since the constitutionality of these other agencies is not disputed, the role of the Corporation

in purchasing their bonds and subscribing to their stock is precisely analogous to that of the Federal Land Banks in purchasing United States bonds. See *Smith* v. *Kansas City Title Co., supra,* 210–211. At any rate, petitioner seeks to avoid the effect of these amendments by stating that they occurred only in 1935 (Br. 16), after the offenses charged in the indictment had taken place. But the purchase of the Home Loan Bank bonds was authorized on April 27, 1934 (Sec. 9, c. 168, 48 Stat. 643). Of the eight counts on which petitioner was convicted (R. 494–495) only Count 14 relates to an offense committed prior to April 27, 1934 (R. 30; compare R. 13, 27, 31–32, 42, 48, 49). Petitioner was sentenced on six of the remaining counts as well as on Count 14. The sentence on each count was for one year and a day, the sentences to run concurrently (R. 6). It is settled that a conviction must be affirmed if any one of concurrent sentences was validly imposed. *Claassen* v. *United States,* 142 U. S. 140, 146–147; *Abrams* v. *United States,* 250 U. S. 616, 619; *Sinclair* v. *United States,* 279 U. S. 263, 299. Since petitioner does not attack the constitutionality of the Corporation subsequent to the amendments authorizing the purchase of Federal Home Loan Bank bonds, it would seem that the conviction must be affirmed without consideration of the constitutional status of the Corporation prior to April 27, 1934.[53]

[53] The Court should, however, note that we earlier have argued that the validity of Section 8 (e) after April 27,

While petitioner's own analysis demonstrates that she was convicted of offenses directed against a validly created fiscal agency of the United States, the answer becomes even clearer if we look into the actual operations and effect of the Corporation.

The Corporation played an important role in protecting the national banking system. On June 30, 1933, the loans of national banks secured by liens on non-farm real estate totalled $1,064,521,000, or 13 per cent of their total loans.[54] Member banks of the Federal Reserve System (see *Westfall* v. *United States,* 274 U. S. 256) held $2,064,089,000 of such investments on June 30, 1933; this was 16 per cent of their total loans and 8 per cent of their total loans and investments.[55] Data as to the total investment in urban home mortgages are less accurate, but the figures earlier given would indicate that all commercial banks held about $3,000,000,000 of urban home mortgages (see *supra,* p. 65). An institution so obviously calculated to protect this huge investment as is the Cor-

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1934, need not be considered because Count 14 relates to an offense committed prior to that time (*supra,* pp. 37–43). Accordingly, if it should agree with that argument, the Court cannot affirm the conviction on the ground here suggested. It must, if the constitutionality of the entire Act is thought to be in issue, either consider the constitutionality of the penal provisions after April 27, 1934, or the constitutionality of the Corporation prior to that date.

[54] 1935 Report of Comptroller of Currency, p. 63.

[55] Member Bank Call Report No. 60, Federal Reserve Board, Dec. 30, 1933, p. 3.

poration cannot be said to be unrelated to the fiscal powers which are exercised in the creation and operation of national banks.

Perhaps of equal importance is the manner in which the national banks are similarly protected through the stability and safety lent other financial institutions. After the crisis of 1933 it needs no citation of authority to demonstrate that our financial system is one which is closely and delicately integrated. The failure of a mortgage company may drag down a trust company, the resulting ebb of public confidence may cause a building and loan association to close its doors, the unpaid loans of which, combined with a growing panic among depositors, may force even a solvent national bank to suspend operations. When it is remembered that the value of urban home mortgages held in 1934 by financial institutions of all types is estimated at $17,500,000,000,[56] it becomes evident that the financial community as a whole was thoroughly dependent upon its investment in urban home mortgages. In 1933 about 44 per cent of the mortgagors were in default (*supra,* p. 68) and the large increase in the volume of foreclosures (*supra,* p. 67) insured that the sinking realty values would

[56] *Supra*, p. 65.

Compare the estimate of $22,075,000,000 of urban real estate mortgages held in 1931 by building and loan associations, banks, and insurance companies. Clark, *Internal Debts of the United States*, p. 76.

make refinancing of maturing mortgages a matter of extreme difficulty, which in turn would force many new defaults by mortgagors. We think it evident that widespread financial distress was certain unless the vicious circle of foreclosures and defaults on urban home mortgages could be broken.

The Congress, possessed of an undisputed power to establish a banking system, had an equally extensive power to protect and preserve that system. The classic statement is found in *Farmers' National Bank* v. *Dearing*, 91 U. S. 29, 34:

> The power to create carries with it the power to preserve. The latter is a corollary from the former.

Further, it is settled that the authority of Congress to create a banking system includes the power to authorize the national banks themselves to conduct any business which is "appropriate or relevant to the banking business." *Osborn* v. *Bank*, 9 Wheat. 738; *First National Bank* v. *Union Trust Co.*, 244 U. S. 416, 420; *Smith* v. *Kansas City Title Co.*, *supra*, 211. It seems beyond dispute that preservation of the urban home mortgage investments was "appropriate or relevant" to the banking business. Congress may validly legislate with respect to matters which have so problematic and remote an effect upon the national banking system as thefts from state banks which are members of the Federal Reserve System. *Westfall* v. *United States*, 274 U. S. 256. It follows *a fortiori* that Congress

may validly remedy an evil which has an indisputable and calamitous impact upon the national banking system. And since such an activity could thus be undertaken by the banks themselves, Congress may, of course, establish a separate corporation more efficiently to do the same thing.

C. THE ACT IS A CONSTITUTIONAL EXERCISE OF THE GENERAL WELFARE POWERS

It is settled that Congress has the power to make expenditures to provide for the general welfare of the United States, and that this power is not limited to the ambit of the other powers enumerated in Section 8 of Article I. *United States* v. *Butler,* 297 U. S. 1; *Steward Machine Co.* v. *Davis,* No. 837, October Term, 1936; *Helvering* v. *Davis,* No. 910, October Term, 1936. We submit that the Home Owners' Loan Corporation was created and functioned in exercise of this power.

1. *The Corporation Functioned in Exercise of the Power to Tax and to Borrow.*—Petitioner does not dispute the power of Congress to provide for the general welfare but does argue that the manner in which the Corporation functioned was such as to make it a "substitute" for taxation and appropriation, and thus not to be justified as providing for the general welfare (Br. 18–20).

The Corporation, all of the capital stock of which is owned by the United States, made cash loans and exchanged its bonds with mortgagees. Its bonds were guaranteed by the United States first as to

interest and then, as to bonds issued after April 27, 1934, both as to interest and as to principal. Congress has at all times prescribed the maximum amount of bonds which the Corporation may issue, and the maximum amount which may be used for each of the designated purposes. (See *supra*, pp. 72–75.) We think that there can be no substantial doubt but that Congress has full constitutional power to provide for the general welfare in this manner.

As we understand petitioner's argument, she does not object on the ground that the money used for the purposes of the Corporation is, apart from the $200,000,000 stock subscription, obtained by borrowing rather than by taxation and appropriation. Nor does she object because the mortgagees are given the bonds in exchange for their mortgage notes held, rather than being paid in cash. Neither objection would have substance. The power of the United States to borrow is necessarily coextensive with the power to tax. And, just as taxes may be earmarked for specified purposes, *Cincinnati Soap Co.* v. *United States*, 301 U. S. 308, 313, so, too, may the proceeds of borrowing (or the direct disposition of the bonds) be earmarked for designated purposes.

Petitioner, instead, appears to challenge the use of the corporate mechanism to accomplish results otherwise within the powers of appropriation and borrowing. But few things are better settled than

that Congress has full power to exercise its constitutional powers through the medium of a corporation. *McCulloch* v. *Maryland,* 4 Wheat. 316, 421–422; *Smith* v. *Kansas City Title Co.,* 255 U. S. 180, 208; *New York ex rel. Rogers* v. *Graves,* 299 U. S. 401, 408. Petitioner's complaint that the corporate mechanism is a device by which to "avoid" governmental exercise of the power is equally applicable to every corporation which the United States has created in order to accomplish a governmental purpose.

The argument that Congress did not "create" the Corporation, but instead directed the Federal Home Loan Bank Board to do so (Br. 35–36) is unsubstantial. There is none but a verbal distinction in the two methods of incorporation. Compare, for example, the general incorporation statute found in every State.

It may be that latent in petitioner's argument is an objection based upon delegation of powers. But such an argument would be groundless. The Home Owners' Loan Act of 1933, and the subsequent amendments, specify the purposes for which the cash and bonds are to be used with all the particularity which would be practicable (*supra,* pp. 72–75). The specificity of the Act goes far beyond what ever requirements may be imposed by the Constitution. See *Cincinnati Soap Co.* v. *United States, supra,* 321–322.

2. *Refinancing of Home Mortgages is for the General Welfare.*—This Court has said that the

decision as to what is a general welfare is one of discretion, and that, "The discretion, however, is not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment." *Helvering* v. *Davis, supra,* p. 6 (pamph.). The question before this Court, as petitioner herself phrases it (Br. 22), is whether or not the activities of the Corporation constitute a "very plain case" of abuse of the Congressional discretion. To this we think there can be but one answer. Moreover, we submit that this answer is compelled whether the functions of the Corporation be viewed as (a) the extension of credit to class of citizens without adequate credit sources, or (b) the protection of home ownership.

a. We shall not burden the Court with a repetition of our argument (*supra,* pp. 78–90) that a source of credit for the home owner was of imperative importance to the national banking system and to the financial structure as a whole. The problem was of urgent national concern. Loans made to necessitous home owners directly and unequivocally benefited the credit structure of the entire country. It cannot be supposed that the welfare which was thus promoted was one which was merely local in character.

Indeed, we are of the view that this question has already been decided by the Court. It is unnecessary to elaborate the basic analogy between the Farm Credit System and the activities of the

Corporation. This Court has several times considered the former system in detail. *Smith* v. *Kansas City Title Co.*, 255 U. S. 180; *Federal Land Bank* v. *Gaines*, 290 U. S. 247; *Federal Land Bank* v. *Priddy*, 295 U. S. 231. It is, accordingly, sufficient here to recall to the Court that the Farm Credit System is essentially a system by which the various Federal credit corporations (the stock of which is partially or wholly owned by the United States) loan money to farmers on first mortgages, or on shorter term notes with other types of security. The validity of the System was initially sustained under the fiscal powers of the United States, *Smith* v. *Kansas City Title Co., supra,* but the subsequent decisions of this Court indicate that it is also a valid exercise of the general welfare powers. Thus, in *Federal Land Bank* v. *Gaines, supra,* this Court said (p. 254):

> It is true that both the petitioner and the Association were, in a broad and general sense, public agencies or instrumentalities to carry out a policy of the government—the extension of credit to those engaged in agriculture to be availed of in the furtherance of agricultural undertakings.

And the Court stated in *Federal Lank Bank* v. *Priddy,* 295 U. S. 229, 231, that the Federal land banks were "engaged in the performance of an important governmental function." We can see no reason why the Constitution can be held to grant power to the United States to make loans to

farmers but not to urban home owners. In the importance to the national well being, the two classes are at least on a parity,[57] and to each class and to the entire nation the alleviation of an unfortunate credit situation had become a matter of primary concern.

Also, it is of interest to note that in *Federal Land Bank* v. *Priddy, supra,* 235–236, the Home Owners' Loan Corporation was listed as an example of a corporation created by Congress "to perform Federal functions."

b. The case is equally clear under the converse view, by which the general welfare is seen to be provided for in the protection of home ownership.

It has been estimated that about 44 per cent of the 6,090,000 urban home owners who had borrowed on the security of their homes were in default on January 1, 1934. (*Supra,* pp. 66, 68.) The situation may be assumed to have been at least as bad in 1933. Foreclosures had mounted until they reached the frightening total of 248,700 in 1933, and in June of that year they were 24,000 in number (*supra,* p. 67). Almost half of the urban mortgages were of a maturity life of nine years or less,[58] so even those home owners who were able to meet

[57] It is to be noted that there are about three times as many urban home owners as there are operating farm owners. See Abstract of Fifteenth Census, Dept. of Commerce, pp. 306, 407.

[58] Long Term Debts in the United States, Dept. of Commerce, Bureau of Foreign and Domestic Commerce, p. 142, summarizes the data in *Financial Survey of Urban Hous-*

current interest payments were, in many cases, faced by imminent default because of the impossibility of refinancing during a time of financial crisis.

It seems to us unnecessary to burden the Court with statistics to demonstrate the vital importance to the nation of preserving its citizens from eviction from their homes. Indeed, this Court has heretofore recognized the basic public interest in maintenance of home ownership. "Housing is a necessary of life." *Block* v. *Hirsh,* 256 U. S. 135, 156. And the decision in *Home Building & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, seems to us to be conclusive on the magnitude and fundamental nature of the public interest in protecting home ownership. There this Court took judicial notice of the severity of the economic crisis and its impact upon necessitous mortgagors, and stated (pp. 444–445) that it produced "conditions urgently demanding relief," in order to secure "the protection of a basic interest of society." The decision of this Court in *Helvering* v. *Davis, supra,* with respect to the national interest in the relief of poverty in old age, also seems conclusive that this public interest is also a national interest. (See also *Federal Land Bank* v. *Gaines, supra,* 254; *Federal Land Bank* v. *Priddy, supra,* 231.

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ing, to show that 20.5 per cent of the loans had maturities of 1–4 years, 27.2 per cent of 5–9 years, 32.0 per cent of 10–14 years, and 20.3 per cent of 15 years and over.

c. The relief of more than a million distressed home owners, and the substitution of sound investments for over $3,000,000,000 of notes of uncertain worth held by mortgagees, seems obviously to be a matter of national concern. Certainly is this the case if the scope of this relief be measured against the appropriations which Congress has made, almost from the beginning, to relieve misfortune and promote the welfare in fields of far narrower scope than that now under consideration."

Petitioner does not take issue with these facts but seeks to demonstrate that the Corporation was not engaged in providing for the general welfare because its activities were inconsequential: "an agency to reduce interest rates from 6% to 5%, a slight shuffling of the debtor-creditor relationship" (Br. 22). The argument has its elements of novelty. Certainly not in recent years has an Act of Congress been challenged on the ground that the changes it has wrought are trivial.

We think it self-evident, if the Congressional appropriation relates to a subject embraced within the "general welfare," that it cannot be assailed

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[69] We shall not extend this brief by listing the particular acts of Congress. Extensive selections of such appropriations are gathered together in the Brief for the United States in *United States* v. *Butler*, No. 401, October Term, 1935, pp. 154–168, App. pp. 61–69, and in the Brief for the Federal Land Bank in *Smith* v. *Kansas City Title Co.*, No. 199, October Term, 1920, pp. 33–37, and for the Joint Stock Land Bank in the same case, pp. 66–70.

because it does not accomplish all the good that might be desired. However, since the issue between petitioner and ourselves has been reduced to such a narrow compass, we shall very briefly indicate the important contributions to the general welfare which may be traced to the operations of the Corporation.

1. The catastrophic increase in the number of foreclosures has been checked (*supra*, p. 77). Just how much of this may be due to the activities of the Corporation is perhaps controversial, but none will deny it a major role in producing this result.

2. Over a million home owners have refinanced their mortgage burdens with the Corporation. It is probably unfair to assume that each of these mortgagors would otherwise have been faced with eviction, but it may safely be said that this was the case with the great majority, since the Act after April 27, 1934, made involuntary default, or prior eviction, coupled with an inability to obtain funds from other sources, a condition to the relief, except, prior to May 28, 1935, in the case of mortgages held by institutions in liquidation (*supra*, p. 74).

3. Financial institutions generally were relieved of frozen, however sound, assets and were protected against the alarming consequences of widespread foreclosures.

4. By taking over the mortgages of financial institutions in liquidation, some $400,000,000 was released to their depositors and creditors.[60]

5. Home ownership and sound real estate financing have each received an encouragement which should be of lasting effect. In substantial part replacing the short-term, unamortized mortgage loan, carrying interest of 6 per cent or more, and requiring frequent refinancing, approximately one-sixth of the urban home mortgage debt has been converted into a 15 year, amortized indebtedness, bearing interest of 5 per cent only (*supra,* p. 76). It is to be expected that the long term amortized loan will become more typical in private lending.[61]

6. During the three years of its lending life, the Corporation enabled mortgagors to pay more than $225,000,000 in delinquent taxes to states and local governments.[62]

7. About $79,000,000 was advanced to mortgagors and expended in reconditioning their refinanced homes, thus putting the homes in livable condition and directly affording about 9,000,000 working days of employment for the hard pressed building trades.[63]

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[60] H. O. L. C., Purposes and Accomplishments, p. 6.

[61] In 1934, as indicated by a representative sampling, 47.7 per cent of the urban mortgage debt was represented by loans with terms of 9 years or less. *Supra,* note 58.

[62] H. O. L. C., Purposes and Accomplishments, p. 7.

[63] See *Ibid.*, p. 7.

8. The Corporation had an important but incalculable role in stabilizing real estate values. To some degree it contributed to the considerable increase in the value of urban residential real estate, by making unnecessary the sale of distressed properties in the market.[84]

Thus, even if the petitioner be correct that the Corporation can be said to provide for the general welfare only if its effects pass a quantitative test, it seems evident that its operations have resulted in an important and extensive contribution to the welfare of the nation.

3. *There is no Violation of the Ninth or Tenth Amendment.* We have shown that the Corporation was engaged in a legitimate Federal function, that of providing for the general welfare. We find it difficult to understand how a power which is thus granted to the Federal Government could nonetheless be one "not delegated" but "reserved to the States" under the Tenth Amendment, or in disparagement of rights retained by the people under the Ninth Amendment. See *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 331.

Even if this could in logic result, it must follow as a matter of constitutional government that powers exercised for the "general" welfare are not inappropriate for the Federal Government. The decision of this Court in *Helvering* v. *Davis, supra* (pamph., pp. 6, 8, 9), is as fully applicable to the

[84] See *Ibid.*, p. 6.

preservation of homes as to the relief of a destitute old age:

> Nor is the concept of the general welfare static. Needs that were narrow or parochial a century ago may be intervowen in our day with the well-being of the nation. What is critical or urgent changes with the times.
>
> The purge of nation-wide calamity that began in 1929 has taught us many lessons. Not the least is the solidarity of interests that may once have seemed to be divided.
>
> * * * * *
>
> The problem is plainly national in area and dimensions. Moreover, laws of the separate states cannot deal with it effectively. Congress, at least, had a basis for that belief. States and local governments are often lacking in the resources that are necessary to finance an adequate program of security for the aged.
>
> * * * * *
>
> When money is spent to promote the general welfare, the concept of welfare or the opposite is shaped by Congress, not the states. So the concept be not arbitrary, the locality must yield.

So, also, in this case, the factors which show that the activities of the Corporation are directed toward providing for the "general" welfare simultaneously demonstrate that they constitute no invasion of the powers of the States or the rights of the people.

If there could be doubt, it must be dispelled on consideration of the fact that in the loans offered by the Corporation there is no coercion of either the debtor or the mortgagee. It merely offers assistance in those cases where both the creditor and the debtor are willing to accept it. There is no over-persuasion into entering a regulatory scheme, as in *United States* v. *Butler,* 297 U. S. 1. There is nothing resembling the conversion of a State building and loan association, merely on the assent of two-thirds of its stockholders, into a Federal corporation over the protest of the State, which created and minutely regulated the corporation. *Hopkins Savings Assn.* v. *Cleary,* 296 U. S. 315. There is no attempt to force creditors of political subdivisions of the State to accept partial payment, as in *Ashton* v. *Cameron County District,* 298 U. S. 513. All that is done is to offer, on application of the debtor and assent of the creditor, to exchange bonds of the Corporation for the mortgage notes held by the creditor. Acceptance is wholly voluntary and receipt of the offered benefits entails no collateral obligations. The States are left as free as before to regulate the transactions by which individuals loan money on mortgage notes, and both the States and the people remain as wholly free as before to devise any scheme they choose to mitigate the hardships of mortgage defaults and foreclosures in a time of economic crisis. Petitioner's contention, in short, seems based upon an unprecedented confusion between charity and duress.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgments of the courts below should be affirmed.

STANLEY REED,
Solicitor General.
BRIEN MCMAHON,
Assistant Attorney General.
GOLDEN W. BELL,
Assistant Solicitor General.
WILLIAM W. BARRON,
Special Assistant to the Attorney General.
WARNER W. GARDNER,
Special Attorney.
W. MARVIN SMITH,
BENJAMIN M. PARKER,
Attorneys.

HORACE RUSSELL,
General Counsel,
E. K. NEUMANN,
Attorney,
Home Owners' Loan Corporation.

NOVEMBER 1937.

APPENDIX

The Home Owners' Loan Act of June 13, 1933, c. 64, 48 Stat. 128, as amended April 27, 1934, c. 168, Secs. 1–6, 9, 11–13, 15, 48 Stat. 643, as amended June 27, 1934, c. 847, Secs. 506, 508, 48 Stat. 1263, 1264, and as amended May 28, 1935, c. 150, Secs. 10–17, 49 Stat. 293, (U. S. C., Title 12, c. 12, Secs. 1461–1468).

AN ACT To provide emergency relief with respect to home mortgage indebtedness, to refinance home mortgages, to extend relief to the owners of homes occupied by them and who are unable to amortize their debt elsewhere, to amend the Federal Home Loan Bank Act, to increase the market for obligations of the United States and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Home Owners' Loan Act of 1933."

DEFINITIONS

SEC. 2. As used in this Act—

(a) The term "Board" means the Federal Home Loan Bank Board created under the Federal Home Loan Bank Act.

(b) The term "Corporation" means the Home Owners' Loan Corporation created under section 4 of this Act.

(c) The term "home mortgage" means a first mortgage on real estate in fee simple or on a leasehold (1) under a lease for not less than ninety-nine years which is renewable, or (2) under a lease having a period of not less than fifty years to run from the

date the mortgage was executed, upon which there is located a dwelling or dwellings for not more than four families, which is used in whole or in part by the owner as a home or held by him as his homestead, and which has a value of not to exceed $20,000; and the term "first mortgage" includes such classes of first liens as are commonly given to secure advances on real estate under the laws of the State in which the real estate is located, together with the credit instruments, if any, secured thereby.

* * * * * *

REPEAL OF DIRECT LOAN PROVISION OF FEDERAL HOME LOAN BANK ACT

SEC. 3. Subsection (d) of section 4 of the Federal Home Loan Bank Act (providing for direct loans to home owners) is hereby repealed.

CREATION OF HOME OWNERS' LOAN CORPORATION

SEC. 4. (a) The Board is hereby authorized and directed to create a corporation to be known as the Home Owners' Loan Corporation, which shall be an instrumentality of the United States, which shall have authority to sue and to be sued in any court of competent jurisdiction, Federal or State, and which shall be under the direction of the Board and operated by it under such bylaws, rules, and regulations as it may prescribe for the accomplishment of the purposes and intent of this section. The members of the Board shall constitute the board of directors of the Corporation and shall serve as such directors without additional compensation.

(b) The Board shall determine the minimum amount of capital stock of the Corporation and is authorized to increase such capital stock from time to time in such amounts as may be necessary, but not to exceed in the aggregate $200,000,000. Such stock shall be subscribed for by the Secretary of the Treasury on behalf of the United States, and payments for such subscriptions shall be subject to call in whole or in part by the Board and shall be made at such time or times as the Secretary of the Treasury deems advisable. The Corporation shall issue to the Secretary of the Treasury receipts for payments by him for or on account of such stock, and such receipts shall be evidence of the stock ownership of the United States. In order to enable the Secretary of the Treasury to make such payments when called, the Reconstruction Finance Corporation is authorized and directed to allocate and make available to the Secretary of the Treasury the sum of $200,000,000, or so much thereof as may be necessary, and for such purpose the amount of the notes, bonds, debentures, or other such obligations which the Reconstruction Finance Corporation is authorized and empowered under section 9 of the Reconstruction Finance Corporation Act, as amended, to have outstanding at any one time, is hereby increased by such amounts as may be necessary.

(c) In order to provide for applications heretofore filed, for applications filed within thirty days after this amendment takes effect, and for carrying out the other purposes of this section, the Corporation is authorized to issue bonds in an aggregate amount not to exceed $4,750,000,000, which may be ex-

changed as hereinafter provided, or which may be sold by the Corporation to obtain funds for carrying out the purposes of this section or for the redemption of any of its outstanding bonds; and the Corporation is further authorized to increase its total bond issue for the purpose of retiring its outstanding bonds by an amount equal to the amount of the bonds to be so retired (except bonds retired from payments of principal on loans), such retirement to be at maturity or by call or purchase or exchange or any method prescribed by the Board with the approval of the Secretary of the Treasury: *Provided,* That no bonds issued under this subsection, as amended, shall have a maturity date later than 1952. Such bonds shall be in such forms and denominations, shall mature within such periods of not more than eighteen years from the date of their issue, shall bear such rates of interest not exceeding 4 per centum per annum, shall be subject to such terms and conditions, and shall be issued in such manner and sold at such prices, as may be prescribed by the Corporation, with the approval of the Secretary of the Treasury. Such bonds shall be fully and unconditionally guaranteed both as to interest and principal by the United States, and such guaranty shall be expressed on the face thereof, and such bonds shall be lawful investments, and may be accepted as security, for all fiduciary, trust, and public funds, the investment or deposit of which shall be under the authority or control of the United States or any officer or officers thereof. In the event that the Corporation shall be unable to pay upon demand, when due, the principal of, or interest on, such bonds, the Secretary of the Treasury shall pay to the

holder the amount thereof which is hereby authorized to be appropriated out of any moneys in the Treasury not otherwise appropriated, and thereupon to the extent of the amount so paid the Secretary of the Treasury shall succeed to all the rights of the holders of such bonds. The Secretary of the Treasury, in his discretion, is authorized to purchase any bonds of the Corporation issued under this subsection which are guaranteed as to interest and principal, and for such purpose the Secretary of the Treasury is authorized to use as a public-debt transaction the proceeds from the sale of any securities hereafter issued under the Second Liberty Bond Act, as amended, and the purposes for which securities may be issued under such Act, as amended, are extended to include any purchases of the Corporation's bonds hereunder. The Secretary of the Treasury may, at any time, sell any of the bonds of the Corporation acquired by him under this subsection. All redemptions, purchases, and sales by the Secretary of the Treasury of the bonds of the Corporation shall be treated as public-debt transactions of the United States. The bonds issued by the Corporation under this subsection shall be exempt, both as to principal and interest from all taxation (except surtaxes, estate, inheritance, and gift taxes) now or hereafter imposed by the United States or any District, Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority. The Corporation, including its franchise, its capital, reserves and surplus, and its loans and income, shall likewise be exempt from such taxation; except that any real property of the Corporation shall be

subject to taxation to the same extent, according to its value, as other real property is taxed. No such bonds shall be issued in excess of the assets of the Corporation, including the assets to be obtained from the proceeds of such bonds, but a failure to comply with this provision shall not invalidate the bonds or the guaranty of the same. The Corporation shall have power to purchase in the open market at any time and at any price not to exceed par any of the bonds issued by it. Any such bonds so purchased may, with the approval of the Secretary of the Treasury, be sold or resold at any time and at any price. For a period of six months after the date this subsection, as amended, takes effect, the Corporation is authorized to refund any of its bonds issued prior to such date or any bonds issued after such date in compliance with commitments of the Corporation outstanding on such date, upon application of the holders thereof, by exchanging therefor bonds of an equal face amount issued by the Corporation under this subsection as amended, and bearing interest at such rate as may be prescribed by the Corporation with the approval of the Secretary of the Treasury; but such rate shall not be less than that first fixed after this subsection, as amended, takes effect on bonds exchanged by the Corporation for home mortgages. For the purpose of such refunding the Corporation is further authorized to increase its total bond issue in an amount equal to the amount of the bonds so refunded. Nothing in this subsection, as amended, shall be construed to prevent the Corporation from issuing bonds in compliance with commitments of the Corporation on the date this subsection, as amended, takes effect [April 27, 1934].

(d) The Corporation is authorized, for a period of three years after the date of enactment of this Act, (1) to acquire in exchange for bonds issued by it, home mortgages and other obligations and liens secured by real estate (including the interest of a vendor under a purchase-money mortgage or contract) recorded or filed in the proper office or executed prior to the date of the enactment of this Act, and (2) in connection with any such exchange, to make advances in cash to pay the taxes and assessments on the real estate, to provide for necessary maintenance and make necessary repairs, to meet the incidental expenses of the transaction, and to pay such amounts, not exceeding $50, to the holder of the mortgage, obligation, or lien acquired as may be the difference between the face value of the bonds exchanged plus accrued interest thereon and the purchase price of the mortgage, obligation, or lien. The face value of the bonds so exchanged plus accrued interest thereon and the cash so advanced shall not exceed in any case $14,000, or 80 per centum of the value of the real estate as determined by an appraisal made by the Corporation, whichever is the smaller. In any case in which the amount of the face value of the bonds exchanged plus accrued interest thereon and the cash advanced is less than the amount the home owner owes with respect to the home mortgage or other obligation or lien so acquired by the Corporation, the Corporation shall credit the difference between such amounts to the home owner and shall reduce the amount owed by the home owner to the Corporation to that extent. Each home mortgage or other obligation or lien so acquired shall be carried as a first lien

or refinanced as a home mortgage by the Corporation on the basis of the price paid therefor by the Corporation, and shall be amortized by means of monthly payments sufficient to retire the interest and principal within a period of not to exceed fifteen years; but the amortization payments of any home owner may be made quarterly, semi-annually, or annually, if in the judgment of the Corporation the situation of the home owner requires it. Interest on the unpaid balance of the obligation of the home owner to the Corporation shall be at a rate not exceeding 5 per centum per annum. The Corporation may at any time grant an extension of time to any home owner for the payment of any installment of principal or interest owed by him to the Corporation if, in the judgment of the Corporation, the circumstances of the home owner and the condition of the security justify such extension. As used in this subsection, the term "real estate" includes only real estate held in fee simple or on a leasehold (1) under a lease for not less than ninety-nine years which is renewable, or (2) under a lease having a period of not less than fifty years to run from the date the mortgage was executed, upon which there is located a dwelling or dwellings for not more than four families, which is used in whole or in part by the owner as a home or held by him as his homestead, and which has a value of not to exceed $20,000. No discrimination shall be made under this Act against any home mortgage by reason of the fact that the real estate securing such mortgage is located in a municipality, county, or taxing district which is in default upon any of its obligations.

For the purposes of this Act, levies of assessments upon real property, made by any special district organized in any State for public improvements, shall be treated as general-tax levies are treated. The Board shall determine the reasonableness of the total annual burden of taxes and assessments of all kinds upon any property offered as security for the payment of a loan made by the Corporation and the effect of the total levies upon the loanable value of such property, but no deduction shall be made from the loanable value of any property for levies not due at the time of making such loan in any instance where the total annual taxes and assessments borne by the said property for all purposes does not exceed a sum which, in the discretion of the Board, is a reasonable annual tax burden for such property.

(e) The Corporation is further authorized, for a period of three years from the date of enactment of this Act, to make loans in cash subject to the same limitations and for the same purposes for which cash advances may be made under subsection (d) of this section, in cases where the property is not otherwise encumbered; but no such loan shall exceed 50 per centum of the value of the property securing the same as determined upon an appraisal made by the Corporation. Each such loan shall be secured by a duly recorded home mortgage, and shall bear interest at the same rate and shall be subject to the same provisions with respect to amortization and extensions as are applicable in the case of obligations refinanced under subsection (d) of this section.

(f) The Corporation is further authorized, for a period of three years from the

date of enactment of this Act, in any case in which the holder of a home mortgage or other obligation or lien eligible for exchange under subsection (d) of this section does not accept the bonds of the Corporation in exchange as provided in such subsection and in which the Corporation finds that the home owner cannot obtain a loan from ordinary lending agencies, to make cash advances to such home owner in an amount not to exceed 40 per centum of the value of the property for the purposes specified in such subsection (d). Each such loan shall be secured by a duly recorded home mortgage and shall bear interest at a rate of interest which shall be uniform throughout the United States, but which in no event shall exceed a rate of 6 per centum per annum, and shall be subject to the same provisions with respect to amortization and extensions as are applicable in cases of obligations refinanced under subsection (d) of this section.

(g) The Corporation is further authorized to exchange bonds and to advance cash to redeem or recover homes lost by the owners by foreclosure or forced sale by a trustee under a deed of trust or under power of attorney, or by voluntary surrender to the mortgagee subsequent to January 1, 1930, subject to the limitations provided in subsection (d) of this section.

(h) The Board shall make rules for the appraisal of the property on which loans are made under this section so as to accomplish the purposes of this Act: *Provided*, That no person shall be allowed to act as appraiser if he is in the employ of any company holding a loan on the property, or if he is interested in the subject matter of the loan.

(i) Any person indebted to the Corporation may make payment to it in part or in full by delivery to it of its bonds which shall be accepted for such purpose at face value.

(j) The Corporation shall have power to select, employ, and fix the compensation of such officers, employees, attorneys, or agents as shall be necessary for the performance of its duties under this Act, without regard to the provisions of other laws applicable to the employment or compensation of officers, employees, attorneys, or agents of the United States. No such officer, employee, attorney, or agent shall be paid compensation at a rate in excess of the rate provided by law in the case of the members of the Board. The Corporation shall be entitled to the free use of the United States mails for its official business in the same manner as the executive departments of the Government, and shall determine its necessary expenditures under this Act and the manner in which they shall be incurred, allowed, and paid, without regard to the provisions of any other law governing the expenditure of public funds. The Corporation shall pay such proportion of the salary and expenses of the members of the Board and of its officers and employees as the Board may determine to be equitable, and may use the facilities of Federal Home Loan Banks, upon making reasonable compensation therefor as determined by the Board. No person shall be appointed or retained as an officer, employee, agent, or attorney, at a fixed salary, in any regional or State office of the Corporation who is an officer or director of any firm, corporation, or association engaged in lending money on real estate; nor shall

any person be appointed or retained as an officer, employee, agent, or attorney in any State or district office of the Corporation, who has not been a bona fide resident of the State served by such office for a period of at least one year immediately preceding the date of his appointment.

(k) The Board is authorized to make such bylaws, rules and regulations, not inconsistent with the provisions of this section, as may be necessary for the proper conduct of the affairs of the Corporation. The Corporation is further authorized and directed to retire and cancel the bonds and stock of the Corporation as rapidly as the resources of the Corporation will permit. All payments upon principal of loans made by the Corporation shall under regulations made by the Corporation be applied to the retirement of the bonds of the corporation. Upon the retirement of such stock, the reasonable value thereof as determined by the Board shall be paid into the Treasury of the United States and the receipts issued therefor shall be canceled. The Board shall proceed to liquidate the Corporation when its purposes have been accomplished, and shall pay any surplus or accumulated funds into the Treasury of the United States. The Corporation may declare and pay such dividends to the United States as may be earned and as in the judgment of the Board it is proper for the Corporation to pay.

(l) No home mortgage or other obligation or lien shall be acquired by the Corporation under subsection (d), and no cash advance shall be made under subsection (f), unless the applicant was in involuntary default on June 13, 1933, with respect to the indebted-

ness on his real estate and is unable to carry or refund his present mortgage indebtedness: *Provided,* That the foregoing limitation shall not apply in any case in which it is specifically shown to the satisfaction of the Corporation that a default after such date was due to unemployment or to economic conditions or misfortune beyond the control of the applicant.

(m) In all cases where the Corporation is authorized to advance cash to provide for necessary maintenance and to make necessary repairs it is also authorized to advance cash or exchange bonds for the rehabilitation, modernization, rebuilding and enlargement of the homes financed; and in all cases where the Corporation has acquired a home mortgage or other obligation or lien it is authorized to advance cash or exchange bonds to provide for the maintenance, repair, rehabilitation, modernization, rebuilding, and enlargement of the homes financed and to take an additional lien, mortgage, or conveyance to secure such additional advance or to take a new home mortgage for the whole indebtedness; but the total amount advanced shall in no case exceed the respective amounts or percentages of value of the real estate as elsewhere provided in this section. Not to exceed $400,000,000 of the proceeds derived from the sale of bonds of the Corporation shall be used in making cash advances to provide for necessary maintenance and necessary repairs and for the rehabilitation, modernization, rebuilding and enlargement of real estate securing the home mortgages and other obligations and liens acquired by the Corporation under this section.

(n) The Corporation is authorized to purchase Federal Home Loan Bank bonds, debentures, or notes, or consolidated Federal Home Loan Bank bonds or debentures. The Corporation is also authorized to purchase full-paid-income shares of Federal Savings and Loan Associations after the funds made available to the Secretary of the Treasury for the purchase of such shares have been exhausted. Such purchases of shares shall be on the same terms and conditions as have been heretofore authorized by law for the purchase of such shares by the Secretary of the Treasury: *Provided,* That the total amount of such shares in any one association held by the Secretary of the Treasury and the Corporation shall not exceed the total amount of such shares heretofore authorized to be held by the Secretary of the Treasury in any one association. The Corporation is also authorized to purchase shares in any institution which is (1) a member of a Federal Home Loan Bank, or (2) whose accounts are insured under title IV of the National Housing Act, if the institution is eligible for insurance under such title; and to make deposits and purchase certificates of deposit and investment certificates in any such institution. Of the total authorized bond issue of the Corporation $300,000,000 shall be available for the purposes of this subsection, without discrimination in favor of Federally chartered associations, and bonds of the Corporation not exceeding such amount may be sold for the purposes of this subsection.

* * * * *

SEC. 7. The provisions of this Act shall apply to the continental United States, to the Territories of Alaska and Hawaii, and to Puerto Rico and the Virgin Islands.

PENALTIES

SEC. 8. (a) Whoever makes any statement, knowing it to be false, or whoever willfully overvalues any security, for the purpose of influencing in any way the action of the Home Owners' Loan Corporation or the Board or an association upon any application, advance, discount, purchase, or repurchase agreement, or loan, under this Act, or any extension thereof by renewal deferment, or action or otherwise, or the acceptance, release, or substitution of security therefor, shall be punished by a fine of not more than $5,000, or by imprisonment for not more than two years, or both.

(b) Whoever (1) falsely makes, forges, or counterfeits any note, debenture, bond, or other obligation or coupon, in imitation of or purporting to be a note, debenture, bond, or other obligation, or coupon, issued by the Home Owners' Loan Corporation or an association; or (2) passes, utters, or publishes, or attempts to pass, utter, or publish, any false, forged, or counterfeited note, debenture, bond, or other obligation, or coupon, purporting to have been issued by the Home Owners' Loan Corporation or an association, knowing the same to be false, forged, or counterfeited; or (3) falsely alters any note, debenture, bond or other obligation, or coupon, issued or purporting to have been issued by the Home Owners' Loan Corporation or an association; or (4) passes, utters, or publishes, or attempts to pass, utter, or publish, as true any falsely altered or spurious note, debenture, bond, or other obligation, or coupon, issued or purporting to have been issued by the Home Owners' Loan Corporation or an association, knowing the

same to be falsely altered or spurious, shall be punished by a fine of not more than $10,000, or by imprisonment for not more than five years, or both.

(c) Whoever, being connected in any capacity with the Board or the Home Owners' Loan Corporation or an association (1) embezzles, abstracts, purloins, or willfully misapplies any moneys, funds, securities, or other things of value, whether belonging to it or pledged or otherwise intrusted to it; or (2) with intent to defraud the Board or the Home Owners' Loan Corporation or an association, or any other body politic or corporate, or any individual, or to deceive any officer, auditor, or examiners of the Board or the Home Owners' Loan Corporation or an association, makes any false entry in any book, report, or statement of or to the Board or the Home Owners' Loan Corporation or an association, or, without being duly authorized, draws any order or issues, puts forth, or assigns any note, debenture, bond, or other obligation, or draft, mortgage, judgment, or decree thereof, shall be punished by a fine of not more than $10,000, or by imprisonment for not more than five years, or both.

(d) The provisions of sections 29, 30, 32, 35, 37, 39, 112, 113, and 117 of the Criminal Code of the United States (U. S. C., title 18, secs. 73, 74, 76, 82, 83, 88, 91, 202, 203, and 207), insofar as applicable, are extended to apply to the Home Owners' Loan Corporation, its contracts or agreements, and an association under this Act which, for the purposes herein shall be held to include advances, loans, discounts, and purchase or repurchase agreements; extensions and re-

newals thereof; and acceptances, releases, and substitutions of security therefor.

(e) No person, partnership, association, or corporation shall, directly or indirectly, solicit, contract for, charge, or receive, or attempt to solicit, contract for, charge, or receive, from any person applying to the Corporation for a loan, (1) any fee, charge, or other consideration, whether bond or cash, except ordinary fees authorized and required by the Corporation for services actually rendered for examination and perfection of title, appraisal, and like necessary services, or (2) any moneys, check, note, or other form of obligation, representing payment of any difference which may exist between the market value and the par value of the bonds of the Home Owners' Loan Corporation. Any person, partnership, association, or corporation violating the provisions of this subsection shall, upon conviction thereof, be fined not more than $5,000, or imprisoned not more than two years, or both.

SEPARABILITY PROVISION

SEC. 9. If any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act, and the application of such provision to other persons or circumstances, shall not be affected thereby.

Act of April 27, 1934, c. 168, 48 Stat. 643, 644, 646:

SEC. 1 * * *

(b) The amendments made by subsection (a) of this section [to Sec. 4(c)] (except with respect to refunding) shall not apply to any bonds heretofore issued by the Home

Owners' Loan Corporation under such section 4 (c), or to any bonds hereafter issued in compliance with commitments of the Corporation outstanding on the date of enactment of this Act.

* * * * *

SEC. 7. (a) The first sentence of the eighth paragraph of section 13 of the Federal Reserve Act, as amended, is further amended by inserting before the semicolon, after the words "Federal Farm Mortgage Corporation Act", a comma and the following: "or by the deposit or pledge of bonds issued under the provisions of sub-section (c) of section 4 of the Home Owners' Loan Act of 1933, as amended.

(b) Paragraph (b) of section 14 of the Federal Reserve Act, as amended, is further amended by inserting after the words "bonds of the Federal Farm Mortgage Corporation having maturities from date of purchase of not exceeding six months" a comma and the following: "bonds issued under the provisions of subsection (c) of section 4 of the Home Owners' Loan Act of 1933, as amended, and having maturities from date of purchase of not exceeding six months."

SEC. 8. The Federal Reserve banks are authorized, with the approval of the Secretary of the Treasury, to act as depositaries, custodians, and fiscal agents for the Home Owners' Loan Corporation.

SEC. 9. The Home Owners' Loan Corporation is authorized to buy bonds or debentures of Federal Home Loan Banks upon such terms as may be agreed upon or to loan money to Federal Home Loan Banks upon such terms as may be agreed upon but not to exceed $50,000,000 shall be invested or advanced under this section.

Act of June 27, 1934, c. 847, 48 Stat. 1246, 1256:

CREATION OF FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION

SEC. 402. (a) There is hereby created a Federal Savings and Loan Insurance Corporation (hereinafter referred to as the "Corporation"), which shall insure the accounts of institutions eligible for insurance as hereinafter provided, and shall be under the direction of a board of trustees to be composed of five members and operated by it under such bylaws, rules, and regulations as it may prescribe for carrying out the purposes of this title. The members of the Federal Home Loan Bank Board shall constitute the board of trustees of the Corporation and shall serve as such without additional compensation. The principal office of the Corporation shall be in the District of Columbia.

(b) The Corporation shall have a capital stock of $100,000,000, which shall be divided into shares of $100 each. The total amount of such capital stock shall be subscribed for by the Home Owners' Loan Corporation which is hereby authorized and directed to subscribe for such stock and make payment therefor in bonds of the Home Owners' Loan Corporation. The Corporation shall issue to the Home Owners' Loan Corporation receipts for payment for or on account of such stock, which shall serve as evidence of the ownership thereof, and the Home Owners' Loan Corporation shall be entitled to the payment of dividends on such stock out of net earnings at a rate equal to the interest rate on such bonds, which dividends shall be cumulative.

Act of May 28, 1935, c. 150, 49 Stat. 293.

SEC. 17. * * *

(b) Section 9 of the Act entitled "An Act to guarantee the bonds of the Home Owners' Loan Corporation, to amend the Home Owners' Loan Act of 1933, and for other purposes", approved April 27, 1934, is hereby repealed.

Resolution adopted by the Board of Directors of the Home Owners' Loan Corporation at a meeting held on January 23, 1934 (Bulletin No. 48, February 3, 1934).

BE IT RESOLVED by the Board of Directors of Home Owners' Loan Corporation that the ordinary charges authorized and required by the Corporation for services actually rendered for examination and perfection of title, appraisal, and like necessary services shall consist of the following:

(1) An appraisal fee for a professional appraisal of the property as approved by the Board of Directors.

(2) A fee for a character report in a sum agreed upon by the State, District, or Territorial Manager after consideration of bids.

(3) Necessary recording and similar fees charged by public officials.

(4) Necessary charges for perfecting title, as approved by the State Counsel of the Corporation, in a sum not exceeding $75.00 in any case, and larger necessary charges if approved by the Board of Directors.

(5) Necessary and usual fees for abstracts, examination of title, examinations of abstracts, opinions on title, certificates of tile or title insurance, as approved by the State, District, or Territorial Counsel of the Corporation.

(6) Charges of attorneys or title companies for escrow services or closing loans, as approved by the State Counsel.

(7) Any other necessary charge for like necessary services, as specifically approved by the Board of Directors.

BE IT FURTHER RESOLVED that ordinary and necessary charges made by agents, brokers, banks, or other corporations or attorneys against mortgagees for services rendered to them are not considered by Home Owners' Loan Corporation to be condemned by Home Owners' Loan Act of 1933. The Corporation will not go forward with the refunding of indebtedness, however, in cases where mortgagees employ representatives upon representations that such representative is able to secure more or better services or treatment from the Corporation than the mortgagee himself could receive or where charges made by such representative in any way, directly or indirectly, adversely affects any mortgagors involved.

U. S. GOVERNMENT PRINTING OFFICE: 1937

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SUPREME COURT OF THE UNITED STATES.

No. 61.—October Term, 1937.

Gertrude Kay, alias Gertrude Klein, Petitioner, *vs.* The United States of America.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[January 31, 1938.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

Petitioner was convicted of violations of Section 8 (a)[1] and (e)[2] of the Home Owners' Loan Act of 1933. Act of June 13, 1933, c. 64, 48 Stat. 128, 134, amended by Act of April 27, 1934, c. 168, 48 Stat. 643, 647. 12 U. S. C., Section 1467 (a) and (e). The Circuit Court of Appeals sustained the conviction (89 F. (2d) 19) and because of the importance of the questions presented certiorari was granted. 301 U. S. 679.

The conviction was upon eight counts of the indictment, viz., counts 5 and 15 under Section 8 (a) and counts 8, 12, 14, 20, 24

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1 Section 8 (a) of the Home Owners' Loan Act (12 U. S. C. 1467 (a)) is as follows:

"Sec. 8 (a) Whoever makes any statement, knowing it to be false, or whoever willfully overvalues any security, for the purpose of influencing in any way the action of the Home Owners' Loan Corporation or the Board or an association upon any application, advance, discount, purchase, or repurchase agreement, or loan, under this Act, or any extension thereof by renewal deferment, or action or otherwise, or the acceptance, release, or substitution of security therefor, shall be punished by a fine of not more than $5,000, or by imprisonment for not more than two years, or both."

2 Section 8 (e) of the Act (12 U. S. C. 1467 (e)), as originally enacted by the Act of June 13, 1933, c. 64, 48 Stat. 134, was as follows:

"(e) No person, partnership, association, or corporation shall make any charge in connection with a loan by the Corporation or an exchange of bonds or cash advance under this Act except ordinary charges authorized and required by the Corporation for services actually rendered for examination and perfecting of title, appraisal, and like necessary services. Any person, partnership, association, or corporation violating the provisions of this subsection shall, upon conviction thereof, be fined not more than $10,000, or imprisoned not more than five years, or both."

By the Act of April 27, 1934, c. 168, Sec. 12, 48 Stat. 643, 647, Section 8 (e) was amended so as to read:

"(e) No person, partnership, association, or corporation shall, directly or indirectly, solicit, contract for, charge or receive, or attempt to solicit, contract for, charge or receive any fee, charge, or other consideration from any

and 25 under Section 8 (e). To count 12 petitioner had pleaded guilty but later was permitted to withdraw that plea, pleaded not guilty, and went to trial. On count 8, imposition of sentence was suspended and petitioner was placed upon probation. On the remaining seven counts, petitioner was sentenced to a year and a day in prison, the sentences to run concurrently.

The Circuit Court of Appeals refused to consider errors arising on the bill of exceptions, as it had not been settled and filed within the time permitted by Rule IX of the Criminal Appeals Rules. The court accordingly limited its consideration to the sufficiency of the indictment, entertaining and deciding the questions of the constitutional validity of the Home Owners' Loan Act and of the provisions of Section 8 (a) and (e) in particular.

The Government contends that the convictions should be sustained, irrespective of questions of the validity of any part of the statute, upon the ground that, the sentences being concurrent, the judgment should be affirmed if good under any one of the counts. In that view, the Government submits that petitioner consented to the judgment on count 12. The point is that petitioner was permited to withdraw her plea of guilty to that count although eleven days had intervened, while Rule II (4) of the Criminal Appeals Rules requires such a motion to be made within ten days. The Government argues that the provision of the rule is mandatory and hence the judgment as one upon consent, should be affirmed without consideration of the merits. Petitioner answers that the Government by going to trial is now estopped to raise the question and further that a plea of guilty does not prevent the defendant from challenging the sufficiency of the indictment. (2 Bishop on Criminal Procedure, 2d ed., Sec. 795.) The point does not appear to have been raised either in the District Court or in the Court of Appeals and it is based solely upon the dates of certain entries in the criminal docket without any supporting proof. We are not disposed to deal with a question of that importance presented in this manner.

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person applying to the Corporation for a loan, whether bond or cash except ordinary fees authorized and required by the Corporation for services actually rendered for examination and perfection of title, appraisal, and like necessary services. Any person, partnership, association, or corporation violating the provisions of this subsection shall, upon conviction thereof, be fined not more than $10,000, or imprisoned not more than five years or both''.

First.—As to the counts under Section 8 (a).[3]—Counts 5 and 15, under that provision, charge that petitioner, being the holder of a second mortgage upon certain premises, in executing the consent to accept bonds of the Home Owners' Loan Corporation in full settlement, and for the purpose of influencing the action of the Corporation, knowingly and falsely stated that her claims were respectively in the sums of $590 and $650, whereas in fact they were respectively only in the sums of $285 and $150.

Petitioner argues that there is no allegation that a loan to the owner was made or approved, or that any payment was made to petitioner; that the second mortgagee's consent is temporary and may be withdrawn; that it is not under oath and that there is no warranty of the truth of the information given. ~~Appellant~~ ^Petitioner argues further that any statement in the consent of a second mortgagee as to the balance due cannot endanger or directly influence any loan made by the Corporation; that the second mortgagee is not an applicant and that the practice in such cases negatives reliance on the consent, as the essential factors are the value of the property, as to which the Corporation makes its appraisal, and the earning capacity of the owner. None of these arguments is impressive. It does not lie with one knowingly making false statements with intent to mislead the officials of the Corporation to say that the statements were not influential or the information not important. There can be no question that Congress was entitled to require that the information be given in good faith and not falsely with intent to mislead. Whether or not the Corporation would act favorably on the loan is not a matter which concerns one seeking to deceive by false information. The case is not one of an action for damages but of criminal liability and actual damage is not an ingredient of the offense.

~~Appellant's~~ ^Petitioner's main argument is that the whole scheme of the statute is invalid; that Congress had no constitutional authority to create the Home Owners' Loan Corporation,—to provide for the conduct of a business enterprise of that character. There is no occasion to consider this broad question as ~~appellant~~ ^petitioner is not entitled to raise it. When one undertakes to cheat the Government or to mislead its officers, or those acting under its authority, by false statements, he has no standing to assert that the operations of the Government in which the effort to cheat or mislead is made are without constitutional sanction.

[3] See Note 1.

We recently dealt with a similar contention that the false claims statute (Criminal Code, Section 35) did not apply to a conspiracy to cheat the United States by false representations in connection with operations under a statute which this Court found to be unconstitutional. We said that such a construction was inadmissible. "It might as well be said that one could embezzle moneys in the United States Treasury with impunity if it turns out that they were collected in the course of invalid transactions. . . . Congress was entitled to protect the Government against those who would swindle it regardless of questions of constitutional authority as to the operations that the Government is conducting. Such questions cannot be raised by those who make false claims against the Government". *United States* v. *Kapp,* decided December 6, 1937; *Madden* v. *United States,* 80 F. (2d) 672. While the instant case is not one of conspiracy to obtain money from the United States, but one of false statements designed to mislead those acting under authority of the Government, the principle involved is the same. Apart from any question of the validity of the other provisions of the Home Owners' Loan Act, Congress was entitled to secure protection against false and misleading representations while the Act was being administered, and the separability provision of the Act (Section 9) is clearly applicable. *Utah Power Co.* v. *Pfost,* 286 U. S. 165, 184.

There is the further argument that the provision of Section 8 (a), separately considered, offends the due process clause as being vague and uncertain. We find no merit in that contention. The statute defining the crime is sufficiently explicit.

Second.—As to the counts under Section 8 (e).[4]—The Government points out that count 14 is based on the statute as it was originally enacted in 1933. That count charges that petitioner on or about April 1, 1934, made a contract with an applicant for a loan for the payment to petitioner of a certain sum for services in connection with the loan, and that the contract was not for "an ordinary charge or fee authorized and required by the Home Owners' Loan Corporation for services actually rendered for examination and perfection of title, appraisal, and like necessary services".

Counts 12, 20, 24 and 25, under the statute as amended, charge that petitioner in or about June, July and September, 1934, made similar contracts for the payment of unauthorized charges.

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[4] See Note 2.

It appears that the Board of Directors in January, 1934, specifically provided that "the ordinary charges authorized and required" for services should consist of (1) an appraisal fee as approved by the Board, (2) a fee for a character report, (3) necessary recording and similar fees, (4) necessary charges for perfecting title in a sum not exceeding $75 in any case and larger necessary charges if approved by the Board, (5) necessary and usual fees for abstracts, examination of title, opinions, certificates of title or title insurance, (6) charges of attorneys or title companies for escrow services or closing loans, and (7) any other necessary charge for like necessary services as specifically approved by the Board.

Section 8 (e) is also separable from the other provisions of the statute. It is plainly designed to prevent the exploitation of applicants. It rests upon the same principle as that which underlies Section 8 (a) as to false and misleading representations to the officials of the Corporation. Congress was entitled not only to prevent misapplication of the public funds and to protect the officials concerned from being misled, but also to protect those who sought loans from being imposed upon by extravagant or improper charges for services in connection with their applications. This would be in the interest "not only of themselves and their families but of the public". See *Yeiser* v. *Dysart*, 267 U. S. 540, 541; *Nebbia* v. *New York*, 291 U. S. 502, 535, 536. Authority to penalize such exploitation while the enterprise is being conducted cannot be regarded as dependent upon the validity of the general plan. That plan might or might not be assailed. If assailed, a long period might elapse before final decision. Meanwhile, the governmental operations go on, and public funds and public transactions require the protection which it was the aim of these penal provisions to secure, whatever might be the ultimate determination as to the validity of the enterprise. *United States* v. *Kapp, supra.*

As a separable provision, the validity of Section 8 (e) is challenged as lacking the requisite definiteness under the due process clause. Section 8 (e) as amended in 1934 omitted the words "in connection with a loan by the Corporation or an exchange of bonds or cash advance under this Act" which were in the original provision. But the context, in the amended section, sufficiently shows that the forbidden charges are those in connection with applications "for a loan, whether bond or cash". The resolution adopted by the Board of Directors sets forth the nature of the ordinary

charges that "are authorized and required", and the power of Congress to provide for such action by the Board is not open to question. See *United States* v. *Grimaud,* 220 U. S. 506, 521; *United States* v. *Shreveport Grain Co.,* 287 U. S. 77, 85. The phrase "like necessary services" in the section describes services which are cognate to those mentioned in the preceding clause "for examination and perfection of title" and "appraisal". And the resolution of the Board, after stating the categories of authorized charges, provides for "any other necessary charge for like necessary services, as specifically approved by the Board of Directors". We think that the statute sets up an ascertainable standard and is "sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties". *United States ex rel. Handler* v. *Hill,* 90 F. (2d) 573, 574. Compare *Connally* v. *General Construction Co.,* 269 U. S. 385, 391; *Old Dearborn Co.* v. *Seagram Corporation,* 299 U. S. 183, 196.

Third.—We have considered the objections to the indictment which were open in the absence of a bill of exceptions. The Circuit Court of Appeals rightly held that the bill of exceptions was not settled and filed in time under the rule. But its decision was rendered before our decision in *Ray* v. *United States,* 301 U. S. 158, construing Rule IV of the Criminal Appeals Rules. See, also, *Forte* v. *United States,* decided December 6, 1937. That rule gives to the Circuit Court of Appeals full supervision and control of the proceedings on appeal, "including the proceedings relating to the preparation of the record on appeal". The appellate court, in the exercise of its sound discretion, has authority to provide for the correction of any miscarriage of justice in connection with any action of the trial judge relating to the settlement and filing of a bill of exceptions.

As the Circuit Court of Appeals may have proceeded in this case upon the assumption that it had no power to approve the settlement and filing of the bill of exceptions and to pass upon the rulings it disclosed, its judgment will be vacated and the cause will be remanded so that the appellate court may be free to exercise its discretion in that relation.

It is so ordered.

Mr. Justice CARDOZO took no part in the consideration and decision of this case.